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United States  
Court of Appeals  
for the Ninth Circuit

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UNION PACIFIC RAILROAD COMPANY, a  
Corporation, Appellant,  
vs.

LaVERL JOHNSON and JOLEEN JOHNSON,  
Husband and Wife, and PACIFIC FRUIT  
EXPRESS COMPANY, a Corporation,  
Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Idaho, Eastern Division

FILED

DEC 6 1954





No. 14498

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United States  
Court of Appeals  
for the Ninth Circuit

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UNION PACIFIC RAILROAD COMPANY, a  
Corporation, Appellant,  
vs.

LaVERL JOHNSON and JOLEEN JOHNSON,  
Husband and Wife, and PACIFIC FRUIT  
EXPRESS COMPANY, a Corporation,  
Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Idaho, Eastern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States in and  
for the District of Idaho, Eastern Division

No. 1775

LA VERL JOHNSON and JOLEEN JOHNSON,  
husband and wife, Plaintiffs,  
vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation, Defendant.

## COMPLAINT

Plaintiffs complain of the defendant and allege:

### I.

That the plaintiffs are residents of the State of Idaho and the defendant is a corporation of the State of Utah; that the matter in controversy exceeds, exclusive of all interest and costs, the sum of \$3,000.00.

### II.

That at all times herein mentioned the defendant was the owner of and operating a railroad through the City of Pocatello, County of Bannock, State of Idaho, hauling for hire passengers, freight and United States mail from and to different points upon its line of railroad in the State of Idaho.

### III.

That on or about November 4, 1950, at or about the hour of 2:30 o'clock p.m. of said day, plaintiff, La Verl Johnson received injuries hereinafter de-

scribed by reason of the negligence, carelessness and disregard of his rights by the defendant in the furnishing of electrical energy and in the operation of an electrical substation located in the City of Pocatello, County of Bannock, State of Idaho.

#### IV.

By reason of the negligence, carelessness and disregard of his rights by the defendant, plaintiff, La Verl Johnson, was so burned and maimed by electrical energy as to require the amputation of both of his legs at the knee and as to require the amputation of his right arm at the shoulder socket; that said plaintiff was otherwise injured by the extreme shock to his entire nervous system resulting from said electrical energy and the amputations.

#### V.

That said plaintiff was hospitalized from immediately following the injury until on or about the 1st day of March, 1951; that he was under constant medical treatment and care during said period and was required to have large and frequent dosages of drugs; that from on or about March 1, 1951, until on or about October 1, 1952, said plaintiff continued under medical care and treatment at his home in Pocatello, Idaho; that until the late summer of 1951, said plaintiff was given continued and frequent dosages of drugs to alleviate his pain and suffering.

#### VI.

That from the date of said injuries, November

4, 1950, until on or about the 1st day of July, 1951, said plaintiff was under a legal disability, was incompetent, wholly unable to understand the nature or effect of his acts and to manage his affairs.

## VII.

That at the time of said injuries, the plaintiff, La Verl Johnson, was in the employ of the Pacific Fruit Express Company in Pocatello, Idaho; that following the accident and during the month of December, 1950, the defendant, through its duly authorized claim agents represented to the plaintiffs that the plaintiff, La Verl Johnson, was entitled to a settlement under the Workmen's Compensation Laws of the State of Idaho and that in addition thereto another settlement would be made by the defendant herein and that plaintiffs had three years in which to file a claim for damages if dissatisfied and that if any considerations concerning the accident other than compensation payments should arise that plaintiffs should contact the Union Pacific Railroad Company Claim Agent.

## VIII.

That, likewise, the defendant from time to time through October of 1952, by and through its claim agents, duly authorized, represented to plaintiffs that no other and additional settlement to that of Workmen's Compensation could be made until plaintiff, La Verl Johnson, had a surgical healing of his amputated legs and arm. That on or about July 10, 1951, the defendant through its authorized

claim agents, and for the purpose of inducing the plaintiff to execute a compensation agreement with the Pacific Fruit Express Company represented that an additional settlement by the defendant would be made upon the surgical healing of the legs and arm of plaintiff, La Verl Johnson.

## IX.

That following the surgical healing of plaintiff, La Verl Johnson's legs and arm on or about the last day of October, 1952, the plaintiffs not hearing from the claim agent of the defendant within a reasonable time thereafter with reference to the additional settlement promised, as heretofore alleged, that plaintiffs should receive, attempted to learn what settlement was to be made; that plaintiffs were then informed no settlement would be made by the Union Pacific Railroad Company. Plaintiffs further allege that they are now advised the defendant will plead the statute of limitations of the State of Idaho as a bar to the action of plaintiffs.

## X.

Plaintiffs allege they were lulled into a false sense of security by the promises, representations, and the assurances of the defendant, as aforesaid; that plaintiffs relied upon such representations and assurances and forebore to sue, and that now to permit the defendant to deny liability solely on the ground that plaintiffs' action was not instituted within the two years statute of limitations of the

State of Idaho would operate as a fraud upon plaintiffs.

## XI.

Plaintiffs allege further that the herein recited conduct of the defendant, by its authorized claim agents, obstructed the investigation and prosecution of plaintiffs' action against the defendant and that the time that such obstruction continued can not be computed as any part of the time within which plaintiffs right of action was required to be instituted.

## XII.

Plaintiffs further allege that in accordance with the allegations contained in Paragraph VIII hereof, plaintiff, La Verl Johnson, was incompetent and under a legal disability and that the time of such disability, to wit, between the date of said accident until on or about the 1st day of July, 1951, does not form a part of the time limit for the commencement of this action against defendant.

## XIII.

That at the date of the accident plaintiff, La Verl Johnson, was an able bodied man of the age of 23 years earning approximately \$300.00 per month; that by reason of the acts of the defendant, plaintiff, La Verl Johnson, has suffered permanent and lasting injuries and a total loss of income, all to plaintiffs' damage in the sum of \$300,000.00.

Wherefore, plaintiffs pray damages in the sum of

\$300,000.00, all costs of suit, and such other additional relief as to the Court appears proper.

/s/ B. W. DAVIS, by GRP,  
/s/ GEORGE R. PHILLIPS,  
/s/ LOUIS F. RACINE, JR., by GRP

Plaintiffs hereby request a trial by jury.

[Endorsed]: Filed March 20, 1953.

---

[Title of District Court and Cause.]

### SUMMONS

To the Above Named Defendant:

You are hereby summoned and required to serve upon plaintiffs' attorneys, whose addresses are Pocatello, Idaho, an answer to the complaint which is herewith served upon you, within twenty days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated: March 20, 1953.

[Seal]      /s/ ED. M. BRYAN,  
                 Clerk of the Court  
         /s/ By LONA MAUSER,  
                 Deputy

Marshal's Return on Service of Writ attached.

[Endorsed]: Filed April 2, 1953.



[Title of District Court and Cause.]

MINUTE ORDER OF MAY 11, 1953

Comes now L. H. Anderson, counsel for the defendant and B. W. Davis, counsel for the plaintiff.

The defendant, through its said counsel, withdrew the Motion to Dismiss the Complaint. There being no objections, the defendant was given 60 days to answer.

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[Title of District Court and Cause.]

MINUTE ENTRY OF MAY 18, 1953

This cause came on regularly this date in open Court on objections to plaintiff's interrogatories; B. W. Davis, George B. Phillips, and L. F. Racine appearing on behalf of the plaintiff, and L. H. Anderson appearing for the defendant. After hearing counsel, the plaintiff was ordered to answer interrogatory No. 1, and the objection was sustained as to the remainder of the interrogatories.

---

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and answering plaintiffs' complaint filed herein, admits, denies and alleges as follows:

First Defense

I.

Admits the allegations of paragraphs I and II.

## II.

Denies the allegations of paragraphs VI, VIII, IX, X, XI and XII.

## III.

Answering paragraph III, admits that on or about November 4, 1950, at approximately 2:30 p.m., of said day, LaVerl Johnson was injured in the City of Pocatello, Bannock County, Idaho; and denies each and every other allegation in said paragraph III.

## IV.

Answering paragraph IV, admits that LaVerl Johnson was so injured by electrical energy as to require the amputation of his legs six inches below the knees, and the amputation of his right arm three inches below the head of the humerus, and denies each and every other allegation in said paragraph.

## V.

Answering paragraph V, admits that immediately following his injuries LaVerl Johnson was hospitalized and that he then and for some time thereafter received medical and surgical treatment; alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of each and every other allegation in said paragraph V.

## VI.

Answering paragraph VII, admits that LaVerl Johnson was in the employ of the Pacific Fruit Express Company, a corporation; denies each and every other allegation in said paragraph VII; al-

leges that the said LaVerl Johnson received his injuries in the course of his employment solely with the Pacific Fruit Express Company, a corporation.

### VIII.

Answering paragraph XIII, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that at the date of the accident LaVerl Johnson was an able bodied man of the age of twenty-three years, earning approximately \$300.00 per month, or the amount of his earnings per month in whatever amount; denies that by reason of any acts of this defendant LaVerl Johnson has suffered permanent and/or lasting injuries, and/or a total loss of income to plaintiffs' damage in the sum of \$300,000.00, or in any sum of money whatsoever.

### Second Defense

The right of action set forth in the complaint did not accrue within two years next before the commencement of this action and the claim is therefore barred by the provisions of Subdivision 4 of Section 5-219 Idaho Code.

### Third Defense

Any injuries sustained or suffered by the plaintiff LaVerl Johnson at the time and place and on the occasion mentioned in the complaint were caused in whole or in part, or were contributed to, by the negligence or fault or want of care of the said LaVerl Johnson, and not by any negligence

or fault or want of care on the part of this defendant.

#### Fourth Defense

The work in which LaVerl Johnson was engaged at the time and place of the occurrence complained of in plaintiffs' complaint had certain risks incident thereto, which were obvious and well known to LaVerl Johnson at all the times he was engaged in said work and also when he first entered thereon, and those risks were assumed by him, and whatever injuries and illnesses he received in doing the said work and which are complained of by the plaintiffs herein, arose from and were caused by those risks thus assumed by him.

Wherefore, this defendant prays that the plaintiffs take nothing by reason of their complaint and that it go hence without day and with its costs.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed July 10, 1953.

[Title of District Court and Cause.]

### MINUTE ENTRY OF NOV. 9, 1953

This cause came regularly on this date in open court for hearing on plaintiffs' objections to interrogatories, plaintiffs' motion to produce, and motion of the Pacific Fruit Express Company to intervene as plaintiff.

After hearing respective counsel, the motion to produce was overruled; the motion for intervention was granted for the purpose of the Pacific Fruit Express Company to file a claim in and for any apportionment for an award that may be obtained. It was ordered that any information not now covered by the Court's order of September 2, 1953 be furnished within the next few days.

---

[Title of District Court and Cause.]

### MINUTE ENTRY OF NOV. 18, 1953

This cause came on for trial before the Court and a jury, Messrs. Louis F. Racine, Jr. and George R. Phillips appearing as counsel for plaintiffs, and Messrs. L. H. Anderson and E. H. Casterlin appearing for the defendant.

Upon motion of L. F. Racine, Jr., one of counsel for plaintiffs, it was ordered that the complaint be amended at paragraph 6, page 2 to read November 4, 1950 instead of March 5, 1950.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. Mabel Hartley and Lydia Bybee, whose names were so drawn, were excused for cause; Mrs. O. W. Peterson and Mary E. Randall, whose names were also drawn, were excused on the plaintiffs' peremptory challenge; and Hazel Peterson, whose name was likewise drawn, was excused on the defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified and who were accepted by the parties to complete the panel of the jury, to-wit:

Wayne E. Bird, Max Bartschi, Roy E. Taylor, Fred S. Haines, Orvin Wennergren, Boyd Keele, Willis W. Williams, Bert E. Taylor, Mrs. Jack Sauer, Ida Christensen, Lorin Ashliman, D. C. Buxton.

The Court directed that two jurors, in addition to the panel, be called to sit as alternate jurors. Thereupon, the names of George Hancock and Donna Heilesen were drawn from the jury box, and on being sworn and examined on voir dire, were found duly qualified, and were accepted by counsel for the respective parties.

The jury panel and the alternate jurors were sworn to well and truly try the cause at issue and a true verdict render.

After a statement of plaintiffs' cause by counsel, Mrs. Joleen Johnson was sworn and examined as a witness on the part of plaintiffs, and other evidence was introduced.

After admonishing the jury, the Court excused them to 10 o'clock a.m., Thursday, November 19th, and continued the trial to that time.

---

[Title of District Court and Cause.]

### MINUTE ENTRY OF NOV. 19, 1953

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

Mrs. Joleen Johnson was recalled and further examined, Patricia E. Brown, Dow B. Peterson, Mrs. Vesta Johnson, Nola Murphy, R. K. Hart, Violet Rae Waldron, H. P. Stearm and LaVerl A. Johnson were called and further examined, as witnesses on the part of the plaintiff, and documentary evidence was introduced.

The depositions of LaVerl Johnson and Joleen Johnson was published upon order of the Court.

After admonishing the jurors, the Court excused them to 10 o'clock a.m., Friday, November 20, 1953, and continued the trial to that time.

[Title of District Court and Cause.]

MINUTE ENTRY OF NOV. 20, 1953

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

Comes now E. H. Casterlin, one of counsel for the defendant, and moves the Court for an order striking defendant's second defense of the Answer and striking Exhibits 1 to 12 inclusive. The Court being advised in the premises, ordered the second defense of the Answer stricken and all exhibits stricken except the hospital records of the plaintiff, being Nos. 9 to 12 inclusive.

Irving J. Eskelson was sworn and examined as a witness on the part of the plaintiff.

After admonishing the jurors, the Court excused them to 10 o'clock a.m., Monday, November 23, 1953, and continued the trial to that time.



[Title of District Court and Cause.]

MINUTE ENTRY OF NOV. 23, 1953

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

Tony Tofenelli, Milio Tofenelli, Guy McClellan, Milton T. Sargent, David John Nelson, Earl R.



Gilbert, Harold W. Rising, Elmer V. Smith and Harold A. Shoup were sworn and examined and LaVerl Johnson was recalled and further examined on the part of the plaintiffs, and other evidence was introduced.

After admonishing the jurors, the Court excused them to 10 o'clock a.m., Tuesday, November 24, 1953, and continued the trial to that time.

---

[Title of District Court and Cause.]

#### MINUTE ENTRY OF NOV. 24, 1953

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

At this time the Court ordered that plaintiffs' exhibits Nos. 1 to 8 inclusive be and the same hereby are, stricken and withdrawn from the record.

Here the plaintiff rests.

After a statement of defendant's cause by counsel, Earl R. Gilbert, Harold R. Arter, Harry C. Meyer, Hubert Brennan, Harold A. Shoup, J. E. Johnson, Melvin Judge and Alvin C. Taylor were sworn and examined as witnesses on the part of the defendant, and other evidence was introduced.

After admonishing the jury, the Court excused them, and continued the trial of this case to 10 o'clock a.m., Wednesday, November 25, 1953.

[Title of District Court and Cause.]

### MINUTE ENTRY OF NOV. 25, 1953

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

Hubert Brennan was recalled and further examined as a witness on the part of the defendant, and here the defendant rests and both sides close.

Both sides having closed, comes now the defendant and moves the Court to instruct the jury to return a verdict for the defendant and against the plaintiff. The motion was by the Court denied.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury.

The Court discharged the alternate jurors, and the jury panel retired in charge of bailiffs, duly sworn, to consider of their verdict. While the jury was still out, the Marshal was directed to provide them with supper at the expense of the United States.

On the same day the jury returned into court, counsel for the respective parties being present, whereupon the jury presented their written verdict, which was in the words following:

[Title of Court and Cause.]

#### Verdict

"We, the jury in the above entitled cause, find for the plaintiffs, and against the defendant, and

assess damages against the defendant in the sum of \$225,000.00.

Owan Wennergren, Foreman.”

The verdict was recorded in the presence of the jury and then read to them and they each confirmed the same.

---

[Title of District Court and Cause.]

### VERDICT

We, the jury in the above entitled cause, find for the plaintiffs, and against the defendant, and assess damages against the defendant in the sum of \$225,000.00.

/s/ OWAN WENNERGREN,  
Foreman

[Endorsed]: Filed November 25, 1953.

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In the United States Court for the District of  
Idaho, Eastern Division

No. 1775

LA VERL JOHNSON and JOLEEN JOHNSON,  
husband and wife, Plaintiffs,  
vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation, Defendant.

### JUDGMENT

This cause came on for trial before the Court and a jury, both parties appearing by counsel, and

the issues having been duly tried and the jury having rendered a verdict for plaintiffs in the sum of \$225,000.00,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs recover of defendant the sum of \$225,000.00 with interest at the rate of 6% per annum, and their costs of action, and that plaintiffs have execution therefor.

Witness The Honorable Chase A. Clark, Judge of said court, and the seal thereof, this 25th day of November, 1953.

[Seal]            /s/ ED. M. BRYAN,  
Clerk

[Endorsed]: Filed November 25, 1953.

—

[Title of District Court and Cause.]

# MOTION FOR JUDGMENT NOTWITH- STANDING THE VERDICT AND MOTION FOR NEW TRIAL

Comes now the Union Pacific Railroad Company, a corporation, and moves the court to set aside the verdict of the jury and to enter judgment in favor of the defendant in accordance with its Motion for Directed Verdict; or, if the foregoing Motion be denied, to set aside the verdict and the judgment entered thereon and grant the defendant a new trial as to all issues, for the following reasons:

## I.

The evidence is wholly insufficient to justify the verdict.

## II.

The evidence is insufficient to justify the verdict in the following respects—

(a) There is no substantial evidence that LaVerl Johnson received the injuries described in the complaint by reason of the negligence, carelessness or disregard of his rights by the defendant in the furnishing of electrical energy or in the operation of an electrical substation as alleged in paragraph II of plaintiffs complaint, or in any other respect whatsoever.

(b) There is no substantial evidence that any of the acts of the defendant were the proximate cause of LaVerl Johnson's injuries.

## III.

The evidence shows that the sole proximate cause of the plaintiff LaVerl Johnson's injuries was the negligence of one H. O. Johnson, Assistant Plant Manager of the Pacific Fruit Express Company, in giving one of two keys, both of which were in his exclusive possession and control, to LaVerl Johnson, thereby permitting the latter, a person inexperienced in working with high voltage electrical current, to enter alone and unaccompanied by any experienced electrician the substation enclosure housing three transformers which had been de-energized and a bank of four lightning arrestors, one neutral, which had not been de-energized, and in in-

structing and directing the said plaintiff to paint wires therein and at which time and place the said plaintiff came in contact with one of the said lightning arrestors resulting in his injuries; and at which time and place the said keys, enclosure and electrical equipment located therein were, and at all times theretofore had been, owned, controlled, managed and operated solely and exclusively by the Pacific Fruit Express Company, a corporation, and its officers, agents and employees; and at which time and place the said transformers and arrestors were not, and at all times prior thereto had not been, defective in any degree whatsoever or hazardous to a greater degree than normally inherent to the equipment itself.

#### IV.

Excessive damages.

#### V.

Excessive damages, appearing to have been given under the influence of passion, prejudice, caprice or sympathy.

#### VI.

The verdict is so excessive that it shocks the sense of justice and shows an utter disregard for the instructions of the court.

#### VII.

The verdict is against law for the reasons hereinabove stated.

#### VIII.

The court erred in permitting plaintiffs' witness Elmer V. Smith to testify over defendant's objec-

tion to the duty of one furnishing electricity to others for the reasons stated in said objection.

### IX.

The court erred in denying defendant's Motion to direct a verdict in its favor at the close of all of the evidence.

### X.

The court erred in giving the second sentence of the following Instruction No. 14:

"The general rule of law is that where one furnishing and supplying electricity for a valuable consideration, merely transmits its electrical current from its line to the consumer's wires, which it did not install and does not control, it has no duty to inspect such wires and is not liable for injuries caused by defects in them. However, where the Company knows of any defects or by the exercise of ordinary care required of a company dealing in electricity, would know of such defects, its duty is to stop and not to send its deadly current to the defective appliance or equipment of the consumer or to and through defective electrical apparatus and it is liable for injuries to person or property caused by a breach of this duty."

For the following reasons—

(a) The same is not the law applicable to the facts in this case.

(b) There is no evidence of any "defects" in the electrical equipment or that the same is "defective electrical apparatus".

(c) There is no evidence that the defendant was "dealing in electricity".

(d) The expression "deadly current" constitutes undue emphasis prejudicing defendant's substantial rights.

## XI.

The court erred in giving the fourth and last sentence of Instruction No. 16, which reads as follows:

"With respect to knowledge on the part of an agent which may be imputed to his principal, the law is that relevant knowledge may be acquired by an agent, either before the time of his employment or after he becomes agent. The important matter is not how the agent acquired the knowledge, but whether or not he had the knowledge when it became relevant in his work for the principal. If the agent has the information in mind at the time it becomes relevant in his work, the principal is bound equally where the knowledge was acquired privately by the agent as where he obtained it while acting as such agent. Therefore where the agents of a company supplying an electric current had or should have had knowledge of a hazardous and dangerous condition of wiring and appliances maintained by a customer, and continued to furnish such current with such knowledge, if injury occurs by reason of such hazardous condition the company is liable for injuries occurring as the proximate result of furnishing such current."



For the following reasons:

(a) The same is not the law applicable to the facts in this case.

(b) There is no evidence that the defendant is "a company supplying electrical current".

(c) There is no evidence that the Pacific Fruit Express Company is "a customer of the defendant" with respect to electrical current.

(d) There is no evidence that the electrical wiring and appliances were hazardous and dangerous to any degree beyond that normally inherent to the same.

## XII.

The court erred in giving Instruction No. 20, reading as follows:

"If from the preponderance of the evidence, you believe that at the time of the alleged injury to LaVerl Johnson, the defendant, Union Pacific Railroad Company, was furnishing electricity to the Pacific Fruit Express Company for a valuable consideration and that the said Union Pacific Railroad Company was advised of or by the exercise of ordinary care the Union Pacific could have and should have known of the conditions that existed at the substation on the date of the accident, and you further find that such conditions were dangerous and hazardous to life and property and that the Union Pacific Railroad Company continued to furnish high voltage electricity through said lines and into said substation and that as a proximate cause thereof LaVerl Johnson was injured, then the defendant was negligent."

For the following reasons:

(a) The same is not the law applicable to the facts in this case.

(b) There is no evidence that the defendant was “furnishing electricity to the Pacific Fruit Express Company for a valuable consideration”.

(c) There is no evidence that the “conditions were dangerous and hazardous to life and property” to any degree beyond that normally inherent to the same.

### XIII.

The court erred in refusing to give defendant’s requested instruction No. 6 reading as follows:

If you find from the evidence in this case that after the substation was constructed that it was turned over to and accepted by the Pacific Fruit Express Company who thereafter owned, operated or controlled it, then you are instructed that the defendant Railroad Company in this case, by merely furnishing electricity to such substation, can not be held responsible for the injuries to LaVerl Johnson.

### XIV.

The court erred in refusing to give defendant’s requested instruction No. 7 reading as follows:

If you find that plaintiff LaVerl Johnson sustained his injuries solely and proximately by reason of someone at the Pacific Fruit Express Company not pulling the switch to cut off the power to the lightning arrestors or that no one at the Pacific Fruit Express Company warned LaVerl Johnson

that the power had not been cut off to the lightning arrestors then the plaintiffs are not entitled to recover and your verdict should be for the defendant. In other words, the defendant Union Pacific Railroad Company cannot be held liable for any acts or conduct on the part of the Pacific Fruit Express Company, its agents, servants or employees.

### XV.

The court erred in refusing to give defendant's requested instruction No. 8 reading as follows:

If you find that the injuries to the plaintiff LaVerl Johnson were caused by the method of operation or the failure to properly operate said substation by the Pacific Fruit Express Company and because of that the plaintiff LaVerl Johnson was injured, then you are instructed that the action or non-action of the Pacific Fruit Express Company was the active, independent, intervening cause and hence the proximate cause of the resulting injury to the plaintiff LaVerl Johnson and your verdict must be in favor of the defendant.

### XVI.

The court erred in refusing to submit to the jury defendant's Special Interrogatory No. 1 reading as follows:

If you return a verdict in favor of the plaintiffs state how and in what manner you find that the defendant Union Pacific Railroad Company was negligent.

Dated this 5th day of December, 1953.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed December 5, 1953.

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[Title of District Court and Cause.]

### MINUTE ENTRY OF DEC. 9, 1953

This cause came on for hearing on Motion to Amend Judgment, and Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, plaintiffs being represented by Messrs. B. W. Davis, L. F. Racine, Jr., and George R. Phillips; L. H. Anderson, Esquire, representing the defendant; and Milton Zener, Esquire, representing the intervenor, Pacific Fruit Express Company.

Upon application of counsel for the Union Pacific Railroad Company, it was ordered that hearing on the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial be continued with the understanding that the Union Pacific Railroad Company file their brief 30 days after they are furnished with a copy of the transcript, plaintiff to have 30 days thereafter to file their brief, and defendant 15 days to reply. After briefs are submitted the matter may be set for oral argument.

It was ordered that the Pacific Fruit Express

Company have 30 days after transcript is furnished to file brief on the Motion to Amend Judgment, plaintiff to have 30 days to answer and Pacific Fruit Express Company 15 days to reply.

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[Title of District Court and Cause.]

### MINUTE ENTRY OF JUNE 21, 1954

This cause came on for oral argument on Motion for Judgment Notwithstanding Verdict and Motion for New Trial, L. H. Anderson, Esquire, appearing as counsel for defendant, and Messrs. B. W. Davis, George R. Phillips and Louis F. Racine, Jr., appearing as counsel for plaintiffs.

After hearing argument of counsel, the Court took the matter under advisement.

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In the United States District Court for the District  
of Idaho, Eastern Division

No. 1775-E

LA VERL JOHNSON and JOLEEN JOHNSON,  
husband and wife, Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation, Defendant,

PACIFIC FRUIT EXPRESS COMPANY, a cor-  
poration, Applicant for Intervention.

### AMENDED JUDGMENT

This cause having heretofore come on for trial before the Court and the jury, all parties appear-

ing by Counsel, and the issues having been fully tried and the jury having rendered a verdict for the Plaintiffs in the amount of Two Hundred Twenty-five Thousand and no/100 Dollars, (\$225,000.00);

That subsequent to the rendering of such verdict for the Plaintiffs, the Intervenor, Pacific Fruit Express Company, a corporation, having filed its Motion to Amend Judgment in accordance with the Complaint of Intervention, and the Stipulations of Counsel heretofore entered into in respect to the said Complaint of Intervention, and that said Motion to Amend Judgment having been granted;

It Is Hereby Ordered, Adjudged and Decreed that the Plaintiffs recover from the Defendant the sum of Two Hundred Twenty-five Thousand and no/100 Dollars (\$225,000.00) with interest at the rate of Six Percent (6%) per annum, and the costs of action, and that the Plaintiffs have execution therefor; and

It Is Further Ordered, Adjudged and Decreed that the Intervenor, Pacific Fruit Express Company, a corporation, is entitled to and shall be paid from the proceeds of such Judgment upon payment thereof the sum of Five Thousand Five Hundred and 26/100 Dollars (\$5,559.26) with interest at the rate of Six Percent (6%) per annum from the 25th day of November, 1953, and for such other and further amounts as may be paid by Pacific Fruit Express Company, a corporation, Intervenor, to the Plaintiffs on account of or by reason of a certain Compensation Agreement heretofore made and entered and approved by the Industrial Accident

Board of the State of Idaho in the matter of La Verl A. Johnson, Claimant, vs. Pacific Fruit Express Company, a corporation, Employer-Self Insured, and award entered by the Industrial Accident Board of the State of Idaho under date of August 3, 1951, and the Supplemental Agreement entered into and filed with the Industrial Accident Board of the State of Idaho under I.A.B. File No. 11-286 on the 25th day of April, 1952.

Witness the Honorable Chase A. Clark, Judge of said Court, and the Seal thereof, this 16th day of August, 1954.

/s/ CHASE A. CLARK,  
District Judge

[Endorsed]: Filed August 16, 1954.

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[Title of District Court and Cause.]

### ORDER

The Order filed in this matter on July 21, 1954 was later recalled because of the necessity of filing an amended judgment by reason of stipulation entered into by counsel for the Plaintiff and Defendant and Counsel for the Pacific Fruit Express Company at the time of trial. The said judgment having been filed on August 16, 1954, brings the matter before the Court on "Motion for Judgment Notwithstanding the Verdict and Motion for New Trial".

The Plaintiff, a resident of Idaho, instituted suit

in this Court charging the defendant with negligence which caused serious damage to the Plaintiff. The case was tried before a jury and a verdict in the amount of \$225,000.00 was returned.

The Court has gone over the record carefully in considering this motion and although some of Defendant's contentions are not without merit I find no prejudicial error in the record.

It is urged that the amount of the verdict is excessive. This is a large verdict and that contention must be given careful consideration by the Court. It must be borne in mind however that the plaintiff was seriously burned and maimed by electrical energy to an extent that it required the amputation of both his legs slightly below the knees and required the amputation of his right arm at the shoulder. Plaintiff also suffered extreme shock to his entire nervous system. He was hospitalized for long periods of time and his pain and suffering were intense. He had undergone five amputations prior to the trial of this case. He is confronted with suffering, disability and humiliation for the rest of his life,—fixed by the mortality tables at forty years. The evidence discloses that because of his condition he seriously contemplated suicide.

In this case the Plaintiff prayed for \$300,000.00 damages, and at the conclusion of the trial the Court instructed the jury, among other things, that if it determined that the defendant was negligent and because of such negligence the Plaintiff suffered damages, then, damages should be assessed in an amount deemed fair and just, not exceeding the



amount prayed for. No exception was taken to the Court's instruction in this regard, in fact no mention was made by counsel for the Defendant, either during the trial or in the argument to the jury, that the amount prayed for was excessive.

The Court also instructed fully as to the measure of damages and there is no doubt in the Court's mind but what the jury conscientiously considered this phase together with all other phases of the instructions before arriving at its verdict.

After the instructions were given to the jury counsel were advised to note any exceptions they might have to those instructions. It has been the policy of this Court, where any exceptions are taken, to give careful consideration to the exceptions and if the Court feels that the instructions should be corrected or changed in any way to call the jury and instruct them further. This procedure was followed in the instant case.

The jury in this case was a very competent and able jury, made up of outstanding citizens residing within the division. It returned a verdict for \$225,000.00, which, as stated above is a large verdict. They had before them, however, the evidence,—the crippled condition of the Plaintiff. Twelve jurors decided that this amount was fair and just.

Although it is the Court's responsibility not to permit juries to return excessive verdicts, if I change the verdict I must use my own judgment and not accept the jury's judgment. This Court

stated its views on jury trials in the case of *Boice vs. Bradley, et al.*, 92 Fed. Supp. 750.

“As a broad general rule, the damages must be reasonable whether merely actual damages or actual and exemplary damages. Unless the amount is so unconscionable as to impress the Court with the injustice of the award and thereby induce the Court to believe that the jury was actuated by passion, prejudice or partiality, there will usually be no interference with the jury’s verdict. At the very threshold of this inquiry it must be remembered that the Constitution of the United States, Amendment 7, and of this State art. 1 §7, as well as all other States has secured the right of trial by jury in civil actions by the words “shall be preserved” or, as stated in the Constitution of the State of Idaho, “shall remain inviolate”. If this mandate is to be obeyed the Court must proceed with caution when a motion such as is now before the Court is considered, with the thought in mind that if the Court is going to set aside the verdict for no reason except that the Court feels it is excessive, this Constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the Court could supplant its opinion in place of the opinion of the jury.”

No doubt it is the duty of the Court to grant a new trial or reduce the amount of the verdict when he is of the opinion that the verdict is so excessive that it indicates that the jury was influenced by passion, prejudice or other improper motives, or,

after making all due allowances, the verdict is clearly arbitrary or such as to shock the conscience.

I cannot find these reasons to exist in this case.

The motion for new trial and motion for judgment notwithstanding the verdict will be denied and it is so Ordered.

Dated this 16th day of August, 1954.

/s/ CHASE A. CLARK,  
Chief Judge, United States District Court for the  
District of Idaho.

[Endorsed]: Filed August 16, 1954.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that the Union Pacific Railroad Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered against it in this action on the 25th day of November, 1953, and from the judgment as amended August 16, 1954, and from the Order denying defendant's Motion for New Trial and its Motion for Judgment n.o.v., dated August 16, 1954.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. C. PHOENIX,

Attorneys for Appellant

[Endorsed]: Filed August 20, 1954.

[Title of District Court and Cause.]

## SUPERSEDEAS AND COST BOND

Know All Men By These Presents, That we, Union Pacific Railroad Company, as principal, and Continental Casualty Company, as surety, are held and firmly bound unto LaVerl Johnson and Joleen Johnson, husband and wife, in the full and just sum of Two Hundred Sixty Thousand and No/100ths Dollars—(\$260,000.00), to be paid to the said LaVerl Johnson and Joleen Johnson, husband and wife, their successors, administrators, executors and assigns, to which payment well and truly to be made, we bind ourselves and our successors, heirs, administrators, and executors, jointly and severally, by these presents.

Sealed with our Seals and dated this 19th day of August, 1954.

Whereas, on the 25th day of November, 1953, in an action pending in the United States District Court for the District of Idaho, Eastern Division, entitled LaVerl Johnson and Joleen Johnson, husband and wife, plaintiffs, against Union Pacific Railroad Company, defendant, a Judgment was rendered against said defendant, which Judgment was amended August 16, 1954; and said defendant has, or is about to file a Notice of Appeal from said Judgment, to the United States Court of Appeals for the Ninth Circuit to reverse the Judgment.

Now, Therefore, the condition of this obligation is such that if the said Union Pacific Railroad Com-

pany shall prosecute its appeal to effect and shall satisfy the Judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation to be void; otherwise to be and remain in full force and effect.

UNION PACIFIC RAILROAD  
COMPANY, Principal

/s/ By L. H. ANDERSON,

One of its Attorneys of Record

[Seal] CONTINENTAL CASUALTY  
COMPANY, Surety,

/s/ By KEITH G. MOLLERUP,

Its Attorney-in-Fact and Resident  
Agent

Approved this 20th day of August, 1954.

/s/ CHASE A. CLARK,  
Chief District Judge

[Endorsed]: Filed August 20, 1954.

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[Title of District Court and Cause.]

DEFENDANT'S REQUESTED  
INSTRUCTIONS

\* \* \* \* \*

No. 1. You are instructed that under the evidence in this case that the plaintiffs are not entitled

to recover against the defendant and you are accordingly directed to return a verdict in favor of the defendant Union Pacific Railroad Company and against the plaintiffs, LaVerl and Joleen Johnson.

\* \* \* \* \*

No. 6. If you find from the evidence in this case that after the substation was constructed that it was turned over to and accepted by the Pacific Fruit Express Company who thereafter owned, operated or controlled it, then you are instructed that the defendant Railroad Company in this case, by merely furnishing electricity to such substation, can not be held responsible for the injuries to LaVerl Johnson.

No. 7. If you find that plaintiff LaVerl Johnson sustained his injuries solely and proximately by reason of someone at the Pacific Fruit Express Company not pulling the switch to cut off the power to the lightning arrestors or that no one at the Pacific Fruit Express Company warned LaVerl Johnson that the power had not been cut off to the lightning arrestors then the plaintiffs are not entitled to recover and your verdict should be for the defendant. In other words, the defendant Union Pacific Railroad Company cannot be held liable for any acts or conduct on the part of the Pacific Fruit Express Company, its agents, servants or employees.

No. 8. If you find that the injuries to the plaintiff LaVerl Johnson were caused by the method of operation or the failure to properly operate said substation by the Pacific Fruit Express Company

and because of that the plaintiff LaVerl Johnson was injured, then you are instructed that the action or non-action of the Pacific Fruit Express Company was the active, independent, intervening cause and hence the proximate cause of the resulting injury to the plaintiff LaVerl Johnson and your verdict must be in favor of the defendant.

\* \* \* \* \*

Special Interrogatory No. 1

If you return a verdict in favor of the plaintiffs state how and in what manner you find that the defendant Union Pacific Railroad Company was negligent.

Answer:.....

[Endorsed]: Filed November 24, 1953.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,  
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to-wit:

1. Complaint.
2. Summons with return attached.
3. Motion to Dismiss.

4. Motion for More Definite Statement.
5. Motion to Strike.
6. Notice Requiring Submission of Motions on Brief.
7. Withdrawal of Notice Requiring Submission of Motions on Brief.
8. Notice of Filing Depositions of LaVerl Johnson, et al.
9. Defendant's Interrogatories to Plaintiffs.
10. Minute Entry of May 11, 1953.
11. Notice of Hearing Objections to Interrogatories.
12. Objections to Interrogatories.
13. Notice of Taking Depositions of L. J. Kovanda.
14. Minute Entry of May 18, 1953.
15. Answers to Interrogatories.
16. Answers to Interrogatories.
17. Notice of hearing objections to Subpoena Duces Tecum.
18. Defendant's Interrogatories to Plaintiffs.
19. Objections to Interrogatories.
20. Answer.
21. Order Denying motion to produce.
22. Motion to produce.
23. Affidavit in Support of Motion.
24. Notice Requiring Submission of Motions on Brief.
25. Notice of Taking Deposition of L. V. Chausse.
26. Notice of Taking Deposition of H. A. Shupe.
27. Motion to Intervene as Plaintiff.



28. Notice of Motion for Leave to Intervene.
29. Minute Entry of November 9, 1953.
30. Notice of Acts of Negligence.
31. Answer to Defendant's Interrogatories to Plaintiffs.
32. Minute Entry of November 18, 1953.
33. Minute Entry of November 19, 1953.
34. Minute Entry of November 20, 1953.
35. Minute Entry of November 23, 1953.
36. Minute Entry of November 24, 1953.
37. Minute Entry of November 25, 1953.
38. Verdict.
39. Judgment.
40. Memorandum of Costs and Disbursements.
41. Notice to Tax Costs.
42. Objections to Cost Bill.
43. Motion to Amend Judgment.
44. Stipulation that allegations in Complaint in Intervention are true.
45. Motion for Judgment Notwithstanding the Verdict and Motion for New Trial.
46. Motion for Stay.
47. Order Granting Stay.
48. Order Granting Leave to Intervene.
49. Stipulation dated December 7, 1953.
50. Notice of hearing on Motion for Judgment, etc.
51. Notice of hearing on Motion to Amend Judgment.

52. Minute Entry of December 9, 1953.
53. Minute Entry of June 21, 1954.
54. Order Denying Motion for New Trial, etc.
55. Order Recalling Order of July 21, 1954.
56. Order Granting Motion to Amend Judgment.
57. Amended Judgment.
58. Order Denying Motion for New Trial, etc.
59. Motion for Supersedeas.
60. Order Granting Supersedeas.
61. Notice of Appeal.
62. Supersedeas and Cost Bond.
63. Reporter's Praecipe.
64. Notice to Appellees.
65. Designation of Record on Appeal.
66. Defendant's Requested Instructions.
67. Plaintiff's Requested Instructions.
68. Transcript of Testimony.
69. Exhibits Nos. 1 to 36 inclusive, except Nos. 15 and 19.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 31st day of August, 1954.

[Seal]            /s/ ED M. BRYAN,  
                         Clerk

In the United States District Court for the District  
of Idaho, Eastern Division

No. 1775

LAVERL JOHNSON and JOLEEN JOHNSON,  
husband and wife, Plaintiffs,  
vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation, Defendant.

### TRANSCRIPT OF PROCEEDINGS

This matter came on for trial at Pocatello, Idaho, before the Honorable Chase A. Clark, United States District Judge, sitting with a jury, on November 18, 1953.

Appearances: Ben W. Davis, Esq., L. F. Racine, Jr., Esq., George R. Phillips, Esq., Pocatello, Idaho, Attorneys for the Plaintiffs. Bryan P. Leverich, Esq., Salt Lake City, Utah, L. H. Anderson, Esq., E. H. Casterlin, Esq., E. C. Phoenix, Esq., Pocatello, Idaho, Attorneys for the Defendant.

November 18, 1953, 10:00 o'clock, a.m.

(Selection of jury.)

(Opening statement by Mr. Racine.)

JOLEEN JOHNSON

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Will you state your name?

(Testimony of Joleen Johnson.)

A. Joleen Johnson.

Q. Have you ever been a witness before, Joleen?

A. No, sir, I haven't.

Q. Then you will address your remarks to the jury and talk loudly enough so that the jury and the Court and counsel and the court reporter can hear you. You are one of the plaintiffs in this case?

A. Yes, sir.

Q. What is your age?                      A. 22.

Q. You are married to Laverl Johnson?

A. Yes.

Q. When were you married to Laverl?

A. March 25, 1949. [1\*]

Q. You were his wife on November 4, 1950?

A. Yes, sir.

Q. Where was Laverl Johnson working on November 4, 1950?

A. For the Pacific Fruit Express.

Q. And where, in what city?

A. Pocatello, Idaho.

Q. In what part of the Pacific Fruit Express was he working?

A. He was working in the ice plant.

Q. When were you first notified of any injuries received by your husband on November 4, 1950?

A. About 3:30 in the afternoon.

Q. When did you first see Mr. Johnson after the injuries, that day?

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\* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Joleen Johnson.)

A. Shortly after that, when one of the fellows got me and took me to the hospital.

Q. And where was your husband?

A. In what they call the out-patient department.

Q. Will you just describe what you observed as to your husband at that time and place?

A. I never had heard of anybody being electrocuted and living——

Q. ——Just describe what you saw, Joleen?

A. When I got there he was lying on a table and his head tossing from one side to the other in apparently pain. The lower part of his legs and his feet were terribly [2] burned, his toes were all crimped up tight and yellow, just a horrible sight. His hand was in a position like this (indicating), he had a black glove on and two or three of his fingers were burned completely away.

Q. Were you able to carry on any conversation with your husband?

A. No, I talked to him and he would answer but it would not be coherent, he would just moan or mumble, he didn't know what he was saying.

Q. After that occasion there, immediately after the injuries, when did you next see your husband?

A. They kept him there until the sedative took effect and then they took him to a room and after he was placed in bed I was allowed to go in again.

Q. What did you observe about your husband then?

A. Well, he was a little calmer then but he didn't realize what was going on, I don't think.

(Testimony of Joleen Johnson.)

Q. Did you have any conversation with him then?

A. Only the fact that I was there and he seemed to know that I was there and that he was hurt. Other than that,—well, he was in quite a bit of pain.

Q. What did you do, Mrs. Johnson, insofar as staying at the hospital those next few days?

A. They had him in a semi-private room in the old Nurse's Home, in a wing off the hospital, and the authorities [3] permitted me to stay with him, I stayed for 36 hours, then I would go home and his father would come and take over and then I would come back and be with him for another 36 hours.

Q. State what you observed prior to the operation on your husband's limbs, as to his condition and your ability to converse with him?

A. Well, he was in a lot of pain, and in being given morphine and codeine every four hours he wasn't awake enough of the time to talk very much. When we did talk he would just ask the same questions over and over,—how the family was, how he got hurt and why it happened to him, and questions of that sort.

Q. Now, how long did that condition go on after November 4, 1950, while your husband was in the hospital, that is, that condition insofar as being able to converse with him?

A. Well, he had his first amputation about a

(Testimony of Joleen Johnson.)

week after he came in and after each of these amputations I believe he was given large quantities of drugs. During that time he would be more or less in an unconscious state and when they would wear off he would talk a little, but he would not be very coherent. A couple of days later he would have another amputation and then it would be a [4] couple of days again before he would make much sense, and about a week passed and then he had the third amputation and the same process again that was as to him being coherent, he was incoherent and it was about the last of January or the first of February he was still getting dope, morphine and drugs,—not as much as at first but he was still getting them.

Q. During that time what is the fact as to whether or not you could carry on an intelligent conversation with your husband?

A. Well, sometimes they would seem intelligent at the time but in a couple of days he would ask the same thing over and I could see that he didn't remember that we had gone over that before.

Q. How long did that condition go on, to your knowledge?

A. That serious, while he was in the hospital, and after he was released from the hospital he would get periods like that at home. People would come to see him and he wouldn't remember them after they had gone for a while. Our conversations would be quite repetitious.

(Testimony of Joleen Johnson.)

Q. Who took care of business affairs, if you had any, during that time?      A. I did. [5]

\* \* \* \* \*

Q. Do you recall when Laverl became surgically healed?

A. Yes, it was in the latter part of October, 1952. Previously we had been talking to Mr. W. R. Wade,—he is connected with the Union and he told us also——

\* \* \* \* \*

Q. Now, Mrs. Johnson, when did Laverl come home from the hospital, if you remember?

A. In the daytime he was released, that is, during the day about the 1st of February but he was to return each evening and stay the night in the hospital.

Q. How long did that continue, if you remember?

A. Well, I think about the rest of that month, February. Then I think he was released from going to the hospital at all around the 1st of March.

Q. When was he taken home, was it at that time?

A. Yes, to stay. He had been coming home every day during February and returning to the hospital at night.

Q. How had he been coming home?

A. I had taken the car every day and he had gotten in a [16] wheelchair and then we put him in the car and took him home and put him in the wheelchair and he was taken in the elevator that



(Testimony of Joleen Johnson.)

my Grandfather had built, he was taken up to the apartment.

Q. After your husband was out of the hospital, what is the fact as to whether there was further treatment?

A. Yes, we were to go to the dispensary.

Q. What dispensary was that?

A. That was the Union Pacific dispensary there by the subway, we were to go every evening to have the stumps dressed.

Q. Did you do that?           A. Yes, we did.

Q. And what is the fact as to how long that continued?

A. That continued from March of 1951 up until about the first of May, 1951, every evening.

Q. What is the fact as to whether or not Laverl was given sedatives and drugs, to your knowledge, during that time?

A. He complained quite a bit of the pain to the nurses there and said that he would like something that would ease it and help him to sleep. They gave him sometimes as much as two boxes at a time about like that (indicating). They were full of yellow and black capsules. I don't know what they were but they did ease the pain and help him to sleep.

Q. Did he take them?           A. Yes, sir. [17]

Q. How did he act, what did you observe about him when he took those pills?

A. They would put him in,—it would not be an unconscious form but it would make him so that

(Testimony of Joleen Johnson.)

he would not know what was going on. It made him tired and sleepy and kind of groggy.

Q. How often did he take those pills?

A. Sometimes two or three a day, it would vary, sometimes it was two or three every four or five hours, and other days the pain would not be so bad and he might not take them until before he went to bed at night.

Q. Did he take them every day?

A. Yes, sir.

Q. How long did that continue, do you recall?

A. As near as I recall up until the first of May when he was admitted to the hospital again.

Q. What was that admission into the hospital in May of 1951?

A. He went back for further surgery on the stumps, with the advice of Dr. Nelson who came into the case in May.

Q. How long was he in the hospital on that occasion, if you know?

A. I think it was just about a month,—the month of May.

Q. Then did he come out?

A. Yes, and he entered Idaho State College, the summer session.

Q. At that time?      A. Yes, sir. [18]

Q. When, if he did go back to the hospital again?

A. Yes, he did, in the latter part of July.

Q. 1951?      A. Yes, sir, 1951.

(Testimony of Joleen Johnson.)

Q. Now, did your husband finish summer school that summer?           A. Yes, sir, he did.

Q. What was the fact during that time, after May of 1951, and during June as to whether or not you were still going to the dispensary?

A. We didn't go to the dispensary itself but about one week and then we went up to the Bannock County out-patient department and Dr. Nelson would come down and look at his legs.

Q. Was your husband taking any drugs during that time, to your knowledge?

A. I think they gave him some shots while he was there, while the doctor was dressing the wounds.

Q. On each occasion?           A. Yes, sir.

Q. To your knowledge, what occurred in the fall of 1951 so far as the treatment of Laverl's condition is concerned?

A. During the latter part of August he was fitted by Dr. Nelson in a plaster cast to be sent to Boise to the Limb Company, to be fitted for limbs. We went one week end and had a rough fitting and then we went the next week [19] and got the legs when they were finished. He stayed at the Elk's Convalescent Home in Boise for them to teach him how to use his legs. [20]

\* \* \* \* \*

Q. Now, Mrs. Johnson, just tell the Court and jury what you have had to do so far as helping LaVerl since this accident occurred, in getting around and helping him to use his limbs?

(Testimony of Joleen Johnson.)

A. Do you mean from the very beginning or now?

Q. Well, just what you have had to do since this accident?

A. Well, my grandfather gave LaVerl a wheelchair for Christmas and it was there for his use whenever he wanted to go any place. At the beginning we had to help him into a wheelchair and then I would push him around. When he left the hospital to come home during the day I would always go to the room and he would get in the wheelchair and then we helped him in the car. I would put the wheelchair in the car and we would go home and then the same procedure at home again until we got him upstairs. All of the time that he was in the wheelchair I, or someone else, would have to [22] push him. During the six weeks that he was going to college in the summer of 1951 I had to take him to school and there would be two or three fellows there that would help him upstairs and into the buildings and take him to class, but I went there every day to help take him to school and to bring him home again. After he got his legs there was the care of washing and taking care of the stump sox and helping him on with his legs and his arm, and, of course, doing things for him that he couldn't do.

Q. Did that continue down to the present time?

A. Yes, there are still things that he cannot do, that I have to do for him.

(Testimony of Joleen Johnson.)

Q. Who helps him on with the legs and the arm?           A. I do.

Q. Have you had occasion, since the last operation in July, 1951, to observe LaVerl's stumps, his limbs, as to their condition?

A. Yes. After July when they had healed to the extent that he could get fitted with limbs there would still be sores on them which would make it painful for him to walk on them and the bottom of one of his stumps still isn't quite healed the way it should be.

Q. What do you do every night, so far as his legs are concerned?

A. Take them off and stand them in a corner.

Q. Is there any dressings or taping to do?

A. No. [24]

\* \* \* \* \*

Q. In November of 1950 did you know of your own knowledge and do you know now what LaVerl's earnings were at that time?

A. Around \$300.00 a month, I believe.

Q. And what is LaVerl doing at this time,—at the time of this trial?

A. Going to school; the Idaho State College. He is also on part time selling ads for the Intermountain Alameda Enterprise.

Q. How much time does he work there?

A. I guess altogether it would be about one day out of a week. He doesn't do it all in one day, it varies. He does it when he gets time off from his school work.

(Testimony of Joleen Johnson.)

Q. Do you know how much he earns there?

A. It depends on the ads that he sells and the service he renders. [25]

\* \* \* \* \*

Q. Mrs. Johnson, have you now, as best you recall, described the condition of Mr. Johnson, your husband, from immediately following the accident up to June 1st, 1951?

A. Yes, sir, as nearly as I can remember. During that time while we were at home he was quite despondent, he didn't talk very much and when he did talk it was a lot about wondering why the accident happened to him and about taking his own life and ending it all. We had a gun, a pistol, and he talked about taking the pistol and ending it all, and how much better off I would be if he wasn't around, and he also took an overdose of those pills that we got from the dispensary, at one time. [26]

\* \* \* \* \*

#### Cross Examination

Q. (By Mr. Anderson): Mrs. Johnson, LaVerl was employed by the Pacific Fruit Express, wasn't he?      A. Yes.

Q. And if at times we use the term PFE we mean Pacific Fruit Express, is that correct?

A. I guess so.

Q. He never was employed by the railroad?

A. No, sir.

Q. And his boss, Mr. H. O. Johnson, he was also Assistant Plant Manager for the Pacific Fruit Express?      A. That is what I understand.

(Testimony of Joleen Johnson.)

Q. Mr. Johnson never worked for the railroad either, did he?

A. I don't know about that. [27]

\* \* \* \* \*

Q. After he went to the hospital, sometime afterwards and before he was discharged about March 1, 1951, prior to that time, was he permitted to leave the hospital in the daytime and come back home?

A. Yes, during February, about the last three weeks.

Q. You took him back to the hospital at night, I believe you said?

A. Every night, yes, during the night he was at the hospital.

Q. You think that he left the hospital, the first time, about March 1st?

A. Permanently discharged, yes.

Q. Was he ever, prior to his discharge from the hospital, and say in December, did he go down to the dispensary for shots or anything of that sort?

A. In December of 1950?

Q. Yes.

A. No, sir, he was in the hospital all of the time.

Q. He was never at the dispensary in December?

A. Not at that time, not that I remember, I am sure that he [28] was confined to his room in the hospital all that time.

Q. When he got to the hospital I think you said

(Testimony of Joleen Johnson.)

or he said that he slept for several days, is that right?

A. It may have been sleeping or unconsciousness or even a coma, I don't know what the medical term would be.

Q. You did say, I think, that when he got to the hospital he was not entirely rational but that he was conscious?

A. It seemed to me that he was conscious, yes.

Q. And he became rational sometime about the following Wednesday after the accident which was on Saturday, at least for a short period of time?

A. He may have.

Q. And then as time went on these rational periods got longer, didn't they?

A. Well, whenever he would have these amputations he would take shots and they would be increased for the severe pain that he had, the shots would be increased in amount and then he would not be rational.

Q. That is when he was under these sedatives?

A. Yes, and this would go on for two or three days.

Q. But he did become rational for short periods of time on or about the following Wednesday after the accident on Saturday?

A. I don't recall as to that.

Q. Do you remember that you so testified in a deposition that [29] was taken on April 29, 1953?

A. I remember testifying at a deposition.



(Testimony of Joleen Johnson.)

Q. And do you remember that you did testify to that effect, that he was rational?

The Court: Is the deposition here so that you can show it to her?

Mr. Anderson: Yes, it is.

Q. Would you look on page 71?

A. This isn't my deposition, this is the deposition of Mr. Shupe.

The Court: She has been handed the wrong deposition, Mr. Anderson.

Q. Now, Mrs. Johnson, if you have the right deposition will you turn to page 71, about the middle of the page?

A. I see it, I think I have it, yes.

Q. And the question was asked: "How soon afterward was he rational?" and then your answer: "He was hurt on Saturday and then Monday he had his first amputation and then it was at least two days before he was fully recovered from the amount of medication that they had administered to him and he was able to talk very long at all and be rational in speaking." Then my question: "Of course, from then on he commenced to have longer periods of rationalness?" and your answer: "Yes." Then my question: [30] "Those periods extended, of course, I suppose your discussions extended, about various things?" And your answer was "Yes", and another question: "He was rational then when he would discuss these questions?" and your answer again was "Yes". Now, that is correct, isn't it, Mrs. Johnson?

(Testimony of Joleen Johnson.)

A. That is right, may I explain something there?

The Court: Yes, you may.

A. On this answer the fact that he was hurt on Saturday and the first amputation was on Monday, I think that it was a week from that Monday. He was in the first room that they took him to for almost a week before he had his first amputation.

Q. Other than that your answer in the deposition, all of your answers there are correct?

A. Yes, other than it would not be two days after the accident that he had his first amputation, it would be a week after that.

Q. Was Dr. Hughart the only doctor that attended LaVerl at the hospital?

A. When he first came in there for emergency treatment Dr. Hughart took care of him, he was the first one there, yes.

Q. Did he take care of him all of the time afterwards until he was discharged about March 1st?

A. He and Dr. Forrest Howard and Dr. Dean Hartvigson.

Q. And while we are on that subject, did Dr. Hughart also take care of him later at the dispensary?      A. Yes, he did.

Q. Was he the only doctor?

A. Up until May.

Q. Do you remember about the first time that you took him to the dispensary?

A. It would have been right around the 1st of March, I imagine, when he was discharged from the hospital that we started going up there.

(Testimony of Joleen Johnson.)

Q. During the time that he was home in the day-time? A. That was February.

Q. Yes, during the daytime when he was home did you take him up there to the dispensary?

A. No, because he was to return to the hospital each evening.

Q. If he left the hospital March 1st then I believe that you took him back every night after that for dressing for about two weeks, is that correct?

A. No, we went every night until May.

Q. To the hospital?

A. No, to the dispensary.

Q. I meant to the hospital?

A. Oh, yes, I believe so.

Q. After he was discharged you took him back to the hospital [32] for about two weeks, every night? A. Yes, as I recall.

Q. After that you took him to the dispensary?

A. Yes, sir.

Q. While he was at home in February and March, I rather imagine that you discussed many subjects with him? A. Yes, sir.

Q. When you did that he was all right and knew what he was doing?

A. He seemed to be, yes.

Q. In discussing these several matters there were some things that you had to do that he couldn't do because of his physical injuries, but if he had not been injured, that is, if it had not been for his physical injuries so that he could move about, he could have transacted his business then, couldn't he?

(Testimony of Joleen Johnson.)

A. I would say physical and mental disabilities.

Q. I wish you would again refer to your deposition, on page 74,—at the top of page 74?

A. Yes, I have it.

Q. There is a question there: “And in connection with the business you and he discussed it and in some instances he took care of it and sometimes maybe you took care of it, is that right?” and then your answer: “Well, we always talked it over and then I would go ahead and do [33] it because he wasn’t in any condition to get around and do it.” Then the question: “But other than that he could have done it, couldn’t he, if it hadn’t been hurt, that is, if it hadn’t been for his condition, and of course he could have done it the same as you could?” and your answer: “If he hadn’t been hurt, yes.” That is correct, is it?

A. That is correct. May I explain?

The Court: Yes, you may.

A. In your question you didn’t state whether it was physical or mental and that is the way I was answering it. I meant that if he had not been hurt at all he would have been just as normal as you or I and he could have carried on his own transactions, but inasmuch as he was hurt and in his physical condition and his mental condition he couldn’t carry on his own affairs.

Q. But you did state that you did talk these matters over?      A. Yes.

Q. And you said that because he wasn’t in any

(Testimony of Joleen Johnson.)

condition to get around you went ahead and did it?

A. That is true. [34]

\* \* \* \* \*

Q. Mr. Johnson is taking pre-law at college now, is he?

A. It is a social science course and the studies would entitle him to take law and finish in a law school, if he so desired.

Q. He drives his own automobile?

A. Yes, he does.

Q. And has been driving since early in 1952?

A. Let's see, in September of 1951 he got his legs and it was the latter part of '51, I believe, that he started to drive his own car.

Q. He has a driver's license?

A. Yes. [59]

\* \* \* \* \*

### Redirect Examination

Q. (By Mr. Racine): What is the fact as to whether LaVerl could write at that time other than his signature?

A. His signature was what he had been practicing on more than anything. He had been practicing writing but it made him emotionally upset to think that he could not do any better than he was doing. His signature was legible, sometimes, however. [62]

\* \* \* \* \*

Q. What is the fact as to who was handling all of the business transactions involving yourself and

(Testimony of Joleen Johnson.)

LaVerl from the time that he got out of the hospital until about June 1st?

A. I took care of them.

Q. What is the fact as to who made the decisions as to what was going to be done?

A. I did, he wasn't in any position to do it.

Q. What is the fact as to whether you discussed it with other members of your family?

A. I did, they gave me ideas who to go and see to get these figures and on other matters, but when a final decision was made, I made it. \* \* \* \* \* [64]

# PATRICIA E. BROWN

Called as a witness by the plaintiff, after being first duly sworn testifies as follows:

## Direct Examination

Q. (By Mr. Racine): Your full name is Patricia E. Brown?      A. Yes, sir.

Q. Where do you reside?

A. 823 South Ninth Avenue, Pocatello, Idaho.

Q. What is your occupation or position?

A. I am Medical Records Librarian at the Bannock Memorial Hospital.

Q. As such records librarian, what type of records do you have under your control?

A. The receiving records of any patient who was ever admitted to the old General Hospital of Pocatello and the Bannock Memorial Hospital of Pocatello and the hospital records of those patients.

(Testimony of Patricia E. Brown.)

Q. Do you have the records pertaining to La-Verl Johnson?           A. Yes, sir, I have.

Q. Do you have them with you in court?

A. I have.

Q. Mrs. Brown, you have been handed what has been marked as Plaintiffs' Exhibit No. 9, can you identify that?           A. Yes, sir, I can.

Q. Would you do so?

A. This is the hospital admission record of La-Verl A. Johnson with a date of admission being November 11, 1950.

Q. November 11?

A. Pardon me, 11-4-1950, that is November 4, 1950.

The Court: Perhaps I should not ask this question but you do not question these hospital records, do you?

Mr. Casterlin: We haven't seen them. [71]

The Court: I see, I thought if you had they might as well be admitted and get it over with.

Q. For the purpose of speeding this matter, this is the first of the hospital records with reference to LaVerl Johnson, is that right?

A. Yes.

Mr. Racine: We offer Exhibit 9 in evidence.

Mr. Casterlin: It will take some time to go through this.

The Court: That is why I asked if you had any question about these records.

Mr. Racine: We have other records here that we can identify.

(Testimony of Patricia E. Brown.)

The Court: Very well, you go ahead.

Q. You have been handed what has been marked Plaintiffs' Exhibit No. 10, I will ask you if you can identify those?

A. Yes, sir, this is the admission record of Verl A. Johnson, admitted May 2, 1951.

Mr. Racine: We offer Plaintiffs' Exhibit No. 10 in evidence at this time.

Mr. Anderson: I think we should be permitted to look at these.

The Court: I am not going to admit them until you have had that opportunity.

Mr. Racine: I was simply trying to get [72] these all offered so that you could have them all at once.

The Court: You may proceed with your examination.

Q. Mrs. Brown, you have been handed what has been marked as Plaintiffs' Exhibit No. 11. Are you in a position to identify that?

A. Yes, sir, it is the medical record of LaVerl Johnson admitted to the Pocatello General Hospital July 20, 1951.

Mr. Racine: We offer that in evidence at this time.

The Court: Counsel may have that one also to look at.

Q. You are now handed what has been marked as Plaintiffs' Exhibit No. 12, are you in a position to identify that?

A. Yes, sir, this is an outpatient record of the



(Testimony of Patricia E. Brown.)

Pocatello General Hospital, it is a record of an outpatient visit of June 9, 1951, and the visit was made by LaVerl Johnson.

Mr. Racine: We offer this exhibit in evidence at this time, being Plaintiffs' Exhibit No. 12.

The Court: That may also be handed to counsel for examination. Are there any other questions from this witness or rather from you, Mr. Racine, to be asked of this witness?

Mr. Racine: I have nothing further. [73]

### Cross Examination

Q. (By Mr. Casterlin): Referring to Plaintiffs' Exhibit No. 9, No. 10 and No. 11, I notice that the preliminary statement in there are in different handwritings, can you tell us who wrote those in, for instance on Exhibit No. 9, the second page and the third page?

Mr. Racine: If the Court please, maybe this is anticipating the cross examination, but I think a few questions might clarify the matter.

The Court: You may take care of it.

A. Am I to answer that question?

The Court: If you can, go ahead.

A. This is in the handwriting of Dr. H. H. Hughart upon both the second and third pages.

Q. I note there are no doctor's signatures on the page?  
A. No, there isn't.

Q. Calling your attention to the second page on Exhibit No. 10, that is in the handwriting of a

(Testimony of Patricia E. Brown.)

different person than on Exhibit No. 9 but that is signed, isn't it?      A. Yes, it is.

Q. Whose signature appears on that?

A. Dr. D. J. Nelson.

Q. Can you tell us off-hand whether or not all of the entries in these records are made by doctors?

A. No, they are not. [74]

Q. Some of the entries are made by whom?

A. By the nurse attending that patient.

Q. Whenever a statement in these exhibits is made by a doctor, does the doctor always sign the pages?

A. No, they don't always. They are supposed to but they don't always.

Q. Whenever a record is made by a nurse, is their identity disclosed in those exhibits?

A. Yes, it is.

The Court: We will recess at this time until 2 o'clock.

November 19, 1953, 2:00 o'clock p.m.

Mr. Casterlin: We have examined the exhibits and have gone over them as far as we were able to read the handwriting, and at this time we object to the exhibits numbered 9, 10 and 11 at this time on the ground that there is no foundation laid to show that these exhibits are an exception to the hearsay rule. It is evident that all of the records were not made by doctors. If there are records made by doctors, the doctors are not present to say that they were made by them or under their super-

(Testimony of Patricia E. Brown.)

vision, at the time the events happened and that the records are correct in those respects. They are not such records as are required to be kept by law. They contain opinions [75] of doctors without basis, therefore the doctors are not present for examination with respect to those opinions. In addition, we object to Exhibit 10 and Exhibit 11 because they show on their face that they pertain to conditions subsequent to March 20, 1951, therefore, they are immaterial and irrelevant in this case, and that applies to No. 12, too. The general objection I wish to go to Exhibit No. 12 also and the special objection to Exhibit No. 12 in addition to Nos. 10 and 11.

May I include in our objection that as the record now stands it is impossible for anyone except one educated in medicine to draw any conclusion from the exhibits as they now stand.

The Court: The objection will be overruled at this time. I will entertain a motion to strike any part of it later and I will strike any portion that I may decide is immaterial. As I understand it, these are hospital records made up from the doctor's record and the nurse's record.

Mr. Racine: We might ask a question or two, with the Court's permission to clear this up.

The Court: I will admit them, Mr. Racine, I think it is well enough known how these hospital records are made up. However, you may go ahead and ask any question you desire. [76]

(Testimony of Patricia E. Brown.)

Redirect Examination

Q. (By Mr. Racine): I will ask you, Mrs. Brown, to state whether or not the records of the hospital particularly the records pertaining to La-Verl Johnson are kept in the regular course of business?      A. They are.

\* \* \* \* \*

DOW B. PETERSON

called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is Dow B. Peterson?      A. Yes, sir.

Q. Where do you reside?

A. 715 Hemlock, Pocatello, Idaho.

Q. What is your position?

A. Pharmacist, Bannock Memorial Hospital.

Q. What records do you have under your supervision as pharmacist of the Bannock Memorial Hospital,—what records do you have under your control, supervision and direction?

A. I have to maintain the records of all narcotics received and disbursed at the hospital. [77]

Q. How long have you been pharmacist at the Bannock County Memorial Hospital?

A. I was employed as pharmacist in June, 1953.

Q. At the time you took the position, what was the fact as to any records which were turned over to you?

A. I received all of the previous records main-

(Testimony of Dow B. Peterson.)

tained by the old Pocatello General Hospital and also by the Bannock Memorial Hospital up to the present time, that is, up to that time.

Q. Do you have those with you?

A. Yes, sir.

Q. As they pertain to LaVerl Johnson?

A. Yes, sir.

Q. Now, as to the records under your control and direction, are they kept in conformance with any Governmental regulation or law?

A. They are kept under the Harrison Narcotic Law which is a Federal law.

Q. To your knowledge what is the fact, as to the record concerning LaVerl Johnson?

A. For each time that he received any narcotic it should have been entered on one of those forms as to what the narcotic was, the time it was given, the date, the doctor by whose order it was given and the nurse who administered the medication.

Q. What is the fact as to whether you made a personal examination of the record with respect to LaVerl Johnson?

A. I spent the better part of yesterday and the day before searching through the record picking out the record in which Mr. Johnson's name appeared, together with the doctors who were his doctors.

The Court: You may hand the exhibit to opposing counsel.

Mr. Casterlin: Have you offered it?

(Testimony of Dow B. Peterson.)

Mr. Racine: We will offer this exhibit, Plaintiffs' Exhibit No. 13.

Mr. Casterlin: May I ask the witness a question concerning this?

The Court: You may.

Q. (By Mr. Casterlin): Mr. Peterson, do I understand that you have looked at the original records and have digested them into this?

A. No, sir, those are the original records.

Q. These are the original records?

A. Yes, sir.

Q. All of the pages, I notice, are not joined together. In the interest of time can you tell me what period this record covers?

A. From November, 1950, through the year 1951.

The Court: Is there any objection? [79]

Mr. Casterlin: We object to these records on the grounds heretofore stated with respect to the general hospital records and on the further ground that there is nothing to show that these records kept in connection with the Harrison Narcotic Act are required to be kept as a result of the presence or order of a doctor, and this witness does not know and has not stated that the medication included in the record was actually administered to Mr. Johnson.

The Court: I think there has been some testimony on the part of Mrs. Johnson in regard to the administration of the drugs. I don't think this would be admissible as to drugs furnished after

(Testimony of Dow B. Peterson.)

March 20, 1951. As I understand it, of course, on the one question as to Mr. Johnson's condition, which would toll the statute of limitation, that would apply to about March 20, 1951, from the time of his injury until March 20, 1951. However, these records, no doubt, would be admissible on the other question as to his condition after March 20, 1951. I will admit these records now so far as they pertain to the narcotics furnished to the plaintiff LaVerl Johnson between the date of his injury and March 20, 1951. It is admitted only for the purpose of showing his mental condition in regard to the statute of limitation, as to whether he was justified in not filing the suit within the period of [80] two years.

Mr. Casterlin: It does not run to,—

The Court: Mr. Casterlin, this goes just to his mental capacity prior to March 20, 1951. Only to the question of whether the statute had tolled or whether he was required to have filed this suit.

Mr. Casterlin: Is it the intention of the Court to have this exhibit stripped down to those dates?

The Court: I am just saying to the jury that they should consider it only up to March 20, 1951. Anything after that date will not be considered by the jury. If you want this witness to take the time to take up the balance of the record, you may do so but I don't think there is anything in it which would be prejudicial.

Mr. Casterlin: I think perhaps we should request, after the date of March 20, 1951, those pages

(Testimony of Dow B. Peterson.)

of the record should be eliminated but we agree with the Court that we should not take the time to do it now.

The Court: Perhaps if we do not take the time now and remove the pages as you say you want, if some doctor takes the stand perhaps the whole matter will be admissible.

Mr. Casterlin: I believe that's all we have. [81]

Mr. Racine: No further questions.

### VESTA JOHNSON

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Phillips): Your name is Vesta Johnson?      A. Yes, sir.

Q. Is it Mrs. Vesta Johnson?

A. Yes, sir, Mrs. Vesta Johnson.

Q. You reside in Pocatello?

A. Yes, 420 East Humbolt.

Q. What is your profession, Mrs. Johnson?

A. Registered professional nurse.

Q. Where did you have your nurse's training?

A. Pocatello General Hospital, Pocatello, Idaho.

Q. And what did that training consist of?

A. Regular course required by any accredited school of nursing in Idaho and we received one semester of special pre-nursing at the University of Idaho Southern Branch.



(Testimony of Vesta Johnson.)

The Court: Will you admit the qualifications of this witness?

Mr. Anderson: We do not know her but I think we will, she has stated enough. [82]

Mr. Phillips: There is one phase of her training that I want to go into, if I may.

The Court: You go ahead. I always use more time by trying to save time.

Q. Will you go ahead and recite your training?

A. We had the usual courses in Psychology and that was in connection with the required, the other required studies besides our floor duty. We spent three months in the University of Oregon at the Durnbaker Children's Hospital, Portland, Oregon, and three months in the Oregon Mental State Hospital in psychiatric affiliation.

Q. Now, that training at the psychiatric hospital, that consisted of both practical work and lectures?

A. Yes, sir.

Q. Do you know the plaintiff, LaVerl Johnson?

A. Yes, sir, I do.

Q. When did you become acquainted with Mr. LaVerl Johnson?

A. November 11, 1950.

Q. What was the occasion for getting acquainted with Mr. Johnson?

A. I was hired at that time as private duty nurse.

Q. Where did you attend him as a private duty nurse?

A. Pocatello General Hospital, Pocatello, Idaho.

Q. How long did you attend Mr. Johnson?

(Testimony of Vesta Johnson.)

A. November 11 to December 30, 1950. [83]

Q. What hours per day, during those times did you attend Mr. Johnson?

A. 3:00 o'clock p.m., until 11:00 o'clock p.m.

Q. Now, will you state the fact as to any pain that Mr. Johnson had during the times you attended him?

Mr. Anderson: We object to that as calling for a conclusion of the witness?

The Court: Well, I imagine he had some pain and I think the nurse would probably know, she may answer.

A. Mr. Johnson evidently was in severe pain the greater part of the time that I was with him.

Q. Will you state of your own knowledge what was done to alleviate that pain?

A. We gave him hypodermic injections and sedatives by capsules, the capsules taken orally.

Q. You say the capsules were taken orally?

A. Yes, by mouth.

Q. Based upon your knowledge of this patient, LaVerl Johnson, as a special nurse, what have you to say as to his mental competency during the time that you attended him?

Mr. Casterlin: I think I will object to that on the ground that a full foundation has not been laid.

The Court: I think she may answer. [84]

She went into the matter of her studies pretty thoroughly on her examination as to her qualifications.

A. Mr. Johnson seemed to be rather confused

(Testimony of Vesta Johnson.)

all of the time that he was there or that I was, he repeated frequently.

Q. Now, just go ahead and explain what you mean, Mrs. Johnson?

A. Well, as I stated he would repeat frequently and he would ask the same questions repeatedly and at various times he told what might be rather fantastic experiences that he had been through, for instance, I remember one in particular that I was told——

Mr. Anderson: ——Who told you?

A. The other nurses that had been on with him.

Mr. Phillips: Don't go into that, Mrs. Johnson just what you observed yourself. It is your opinion that I want, what was your opinion as to his mental competency?

A. My opinion as to his mental competency was that he was not mentally competent.

Mr. Phillips: You may cross examine.

#### Cross Examination

Q. (By Mr. Anderson): You stated that he was confused most of the time, you meant the period from November 11, 1950, to December 30, 1950?

A. Yes.

Q. Sometime after November 11 and certainly before December 30, 1950, his condition improved, did it not?

A. Yes, it did improve.

Q. And as his physical condition improved his mental condition also improved?

A. It did to a certain extent.

(Testimony of Vesta Johnson.)

Q. He would have periods of rationalness?

A. He was rational in some respects.

Q. Did you visit with him when you were caring for him?      A. Yes, I did.

Q. And you carried on conversations with him?

A. Yes, sir.

Q. He understood what you were saying?

A. At the time, yes, and then maybe in a day or two or in several hours he would ask me what it was that I had told him.

Q. Was that right after he had taken some sedatives?      A. Not always.

Q. But usually it was?

A. Well, most frequently it was then, but definitely not always.

Q. While you were there along toward the end of the period that you were there he did leave the hospital and go home during the day? [86]

A. I think he did. I remember that he went home for Christmas Day and we did take him for short rides in the car.

Q. At that time his pain had diminished a great deal?

A. It diminished, but according to his statement it never was completely alleviated during the time that I was with him.

Q. Did he know the people that came in the room?      A. Yes, he did.

Q. And he carried on a conversation with them?

A. Yes, sir.

Q. What was the nature of the drug that he was given to relieve his pain?

(Testimony of Vesta Johnson.)

A. I believe that is in the medical record and you would get a more correct record than I can remember.

Q. Did you ever give any to him?

A. Yes, I did.

Q. Do you know what they were?

A. I don't remember.

Q. They were just a pain killer, were they not?

A. Not entirely, it was for pain and restlessness.

Q. Restlessness does not indicate mental incompetency, does it?      A. Well, I don't know.

Q. Ordinarily when we have a pain and take something for it we might go to sleep as a result of the sedative, but when we wake up we are mentally alert, that is the result [87] generally with people?      A. Not always, no.

Q. A pain killer ordinarily has nothing to do with the mentality of a person, does it?

A. Quite frequently it does.

Q. Are you prepared to say that on December 30 when you left there or left him that he was so incompetent at least at times that he could not conduct his own affairs?      A. Yes, sir.

Q. At times he could conduct his own affairs?

The Court: She answered it the other way, Mr. Anderson. I will ask the reporter to read the question and answer.

(Question and answer read by reporter.)

Q. So at times he could not conduct his own affairs but there were times that he could?

(Testimony of Vesta Johnson.)

A. I don't think that I am qualified to answer that.

Q. I thought that you answered it one way, cannot you answer it the other?

Mr. Phillips: We object to that as repetition, it has been answered.

The Court: There is nothing for me to rule upon. Go ahead.

A. I would say that he wasn't except for some minor details.

Q. Minor details, what do you mean by that?

A. Such as saying what he wanted to wear and what he wanted for dinner and such as that, but to carry on business I would say that he wasn't.

Q. At any time during the 24 hours of the day?

Mr. Phillips: I object to that, she has already testified that she was only on duty for eight hours.

Mr. Anderson: For her eight hour period, I will cut it down to that.

The Court: I imagine that she could take in the space between if she was there eight hours out of every 24. You understand the question, do you?

A. Yes, I do, but I cannot state entirely as a fact, it is my personal opinion.

The Court: You are required to give only your opinion, that is all that is expected of you.

A. I would say that he wasn't.

Q. At any time during the eight hour period that you were with him?

A. No.

Mr. Anderson: I think that is all. [89]

(Testimony of Vesta Johnson.)

Redirect Examination

Q. (By Mr. Phillips): Will you state the fact as to whether or not the pain was alleviated even under those drugs?

A. Not entirely, no.

Q. Now, those drugs that were given, you stated on cross examination that they would dull the senses, maybe not in those words?

A. Yes, they will.

Q. And does the senses that you refer to, does that include the mind?           A. Yes, sir.

\* \* \* \* \* [90]

NONA MURPHY

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Phillips): Your name is Nona Murphy?           A. Yes, sir.

Q. Have you ever been a witness in any case before?           A. No, I haven't.

Q. You reside here in Pocatello?

A. Yes, at 3753 Pole Line Road.

Q. And what is your profession?

A. I am a registered nurse.

Q. Where did you have your training? [91]

A. I had approximately two years and nine months at the Seton School of Nursing in Colorado, Colorado Springs, Trinidad, Pueblo, and also in Denver, and one year in the General Hospital at Pocatello.

(Testimony of Nona Murphy.)

Q. What did that training consist of?

A. It consisted of general nurse's training in the field of hospital training and three months affiliation, psychiatric training at Denver and your pediatric training, tubercular training, obstetrics and contagion.

Q. In your three months training in the psychiatric,—

A. —The Denver Psychiatric Hospital.

Q. Did you have training both practical and lectures concerning incompetents?

A. Yes, we did.

Q. Do you know LaVerl Johnson, the plaintiff here?      A. Yes, sir.

Q. When did you get acquainted with LaVerl Johnson?      A. November 10, 1950.

Q. What was the capacity in which you got acquainted with him?

A. I was his special duty nurse from 11:00 p.m. to 7:00 a.m.

Q. How long did you attend Mr. Johnson?

A. I was with him from November 10 to February 4, except for two weeks,—a period of two weeks in December, in the middle of December, I believe it was December 12, to 26, if I remember right. [92]

Q. You were on duty there from what hour to what hour?

A. From 11:00 p.m. to 7:00 a.m.

Q. Will you state, if you know, whether Mr.



(Testimony of Nona Murphy.)

Johnson suffered with pain while you were attending him?

A. I would say that he suffered extreme pain on my shift, when the doctor made his rounds he more or less thought that he could spend more time with Mr. Johnson and on certain occasions he even clipped a few toes from his left foot, before it was amputated.

Q. Those toes were clipped in the room there?

A. Yes, in the hospital room.

Q. Will you state, if you know, what was done to alleviate the pain for Mr. Johnson?

A. He was given hypodermic injections of narcotics and sedation.

Q. Did you give those narcotics at times?

A. Yes, I did, as a rule before the doctor changed the dressings or treated the wounds and quite often I repeated that as soon as the doctor was finished.

Q. Mrs. Murphy, based upon your knowledge as a special nurse with this patient and on your training and experience, what have you to say as to the mental competency of LaVerl Johnson during the time that you were treating or nursing him?

Mr. Anderson: I object to that, I don't [93] think that she is qualified to express an opinion on that.

The Court: I will let the jury weigh her testimony, she has stated her background of education, she may answer.

A. I had several occasions to carry on a con-

(Testimony of Nona Murphy.)

versation with Mr. Johnson and I too discovered that he was confused. On many occasions he told exaggerated, fantastic stories. At one time he was so disturbed,—at that time he was talking on religion, at which time we couldn't quiet him down with sedation. He was talking to members of his church for several hours one night and we couldn't quiet him down.

Q. Was this pain alleviated by the use of this drug or drugs?

A. It didn't appear to be, no. At times he would wake up and complain of pain in the stumps or in his shoulder and I would try to quiet him down, trying to keep the length of time between the narcotics to three hour periods which we tried to do in the hospital. Sometimes they were given oftener than that, however.

Q. I think that you stated that you attended him up to February?

A. February 4, yes.

Q. What was his competency on the date of February 4, if you know?

A. In the last two or three weeks I was with him I didn't [94] have an opportunity to talk or to carry on a conversation very much because he would go to sleep after I changed the dressings on the wounds, but he was still confused and he was still telling these experiences which to me seemed exaggerated. I would not consider him competent at that time, on February 4th, the last time I saw him in the hospital.

(Testimony of Nona Murphy.)

Q. Was he competent at any time prior to that time when you attended him?

A. I would say that he was not, no.

Mr. Phillips: I think you may examine.

### Cross Examination

Q. (By Mr. Anderson): Let us say for the last two weeks, how often did you give hypos or sedatives to Mr. Johnson?

A. He had sedatives every night, before he went to sleep, he required them to go to sleep and get his rest, and as I remember it, he had a narcotic every night too. I cannot be positive in regard to that, the records would have to be checked, but as I remember it, he received hypos at that time.

Q. You say he did or did not?

A. As I remember, he did but I cannot be positive about that.

Q. There were times, I take it, when he carried on an ordinary [95] conversation with you?

A. At the time it seemed to be an ordinary conversation but later on he would repeat things that he had said and he would not remember what he had told me.

Q. Did he have visitors come while you were there?

A. Only at that time that he was talking about religion, he did have some members of his church come in then.

Q. Didn't he have other visitors?

A. His wife was generally with him when I

(Testimony of Nona Murphy.)

came to work but she usually left right after or very shortly after I got there. It was the night hours and there are no visitors often at that time.

Q. But when visitors came they generally carried on a conversation with Mr. Johnson, didn't they?

A. Well, his wife usually talked to me when I came and not to Mr. Johnson.

Q. I don't believe that you answered my question, when he had visitors they usually talked to him?

A. The visitors from his church, the ones that I mentioned, they went in and talked to him but I wouldn't say that his conversation was at all rational at that time.

Q. You talked to him, didn't you?

A. I talked to him while I changed his dressings, yes.

Q. He knew what you were doing for him, didn't he?

A. He knew that I was trying to help him.

Q. What is the difference, Mrs. Murphy, between sedatives and narcotics?

A. Narcotics are given for the relief of pain and a sedative is a hypnotic which is given for restlessness, it doesn't have anything to do with pain to the extent that narcotics do, it will relax a person and let him rest.

Q. By narcotics what do you mean, morphine?

A. Morphine, codeine and demeral, there are many different narcotics.

(Testimony of Nona Murphy.)

Q. Naturally sedatives were not for the pain, they were to allow him to rest?

A. We try to cut down the use of narcotics. When a patient appears to be improving slightly if there is a possible chance to relax him enough by the use of sedatives, where the narcotic is not absolutely necessary we try the sedative first.

Mr. Anderson: I think that is all.

Mr. Phillips: That is all. \* \* \* \* \* [97]

### R. K. HART

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Phillips): Your name is R. K. Hart and you live in Pocatello, Idaho?

A. That is correct.

Q. What is your occupation, Mr. Hart?

A. I am a public accountant.

Q. You know LaVerl Johnson and Mrs. Joleen Johnson? A. Yes, I do.

Q. Will you state the facts as to your knowing LaVerl Johnson after February of 1951?

A. At that time I was living on Trail Creek, which is two or three blocks from the residence at which he was living when he came home from the hospital. In my capacity as Bishop of the Ward, we, of course, visit all of those who are ill or who have had tragedy occur to them,—I wasn't Bishop at that time but I was interested in him and I vis-

(Testimony of R. K. Hart.)

ited him shortly after he returned from the hospital.

Q. Did you visit him later on in the spring?

A. No, my contact with him later was when he first came to church after that.

Q. And about when was that? [98]

A. I would say about in the early summer or the middle of the summer, the latter part of June or early in July, I would say.

Q. And the occasion that you contacted him at that time, did you have occasion to observe Mr. Johnson?      A. Yes, sir, I did.

Q. Did you talk to him?

A. Yes, we greeted each other and had a few words of conversation.

Q. Will you state and describe to us what you observed about Mr. Johnson at those times?

A. Well, of course, his physical appearance was rather shocking inasmuch as that was the first time that I had seen him. He was very thin, his face was very thin and shrunken. His eyes had a sort of pained expression, if you can put it that way. He seemed very uncertain about talking, in all his talking about anything that he had to say. He seemed quite concerned and ill at ease, I am not sure that I can find any better words to describe it than that. I remember a time or two when he first came to church that he was unable to stay through the proceedings. He had to leave before it was out and I presumed that was because of his physical or mental discomfort or both. \* \* \* \* \* [99]

VIOLET RAE WALDRUN

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is Violet Rae Waldrun?      A. Yes, sir.

Q. And you reside here in Pocatello?

A. Yes, sir, No. 3 Foothills Drive, Pocatello.

Q. Have you ever been a witness before?

A. No, I have not. [103]

Q. Now, if you will address yourself to the jury and speak loudly enough so they can all hear?

A. Yes, sir, I will.

Q. On and before November 4, 1950, I will ask you if you were acquainted with LaVerl Johnson?

A. Slightly.

Q. On or about November 4, 1950, where did Mr. Johnson live?

A. I don't know just as to that. I knew them after they moved where he lived after he came from the hospital.

Q. Will you explain then the circumstances under which you became better acquainted with him?

A. Yes, sir, we lived in the apartment where her grandmother and grandfather lived, we knew them and the family because we lived with them and we knew them slightly at the time they were married. From then on we were better acquainted and when the accident happened it struck us as a part of the family. We were interested in them as we visited

(Testimony of Violet Rae Waldrun.)

them and we knew of this young man's character and we knew the people and we were very much interested in these people.

Q. Where do the Johnsons live with respect to where you live?      A. At the present time?

Q. Yes.      A. Out north of Pocatello.

Q. At any time subsequent to the accident did they live in your neighborhood? [104]

A. I don't know just where they lived at the time of the accident.

Q. After the accident, I asked about?

A. Oh, yes, yes, they did.

Q. Where with regard to where you live did they live at that time?

A. Just one block from us.

Q. Tell the Court and jury whether or not after Mr. Johnson was out of the hospital in the spring of 1951, whether or not you had occasion to visit the home of the Johnsons?

A. Yes, I visited Mr. Johnson after he came from the hospital.

Q. And did you go there on various occasions?

A. I did.

Q. On the occasions that you went to the Johnson home did you see Mr. Johnson?

A. I did see him.

Q. Tell the Court and jury what you observed with regard to Mr. Johnson on those occasions,—after he was out of the hospital and into the summer of 1951?

A. I observed that Mr. Johnson seemed to be



(Testimony of Violet Rae Waldrun.)

confused over his condition. We didn't care to talk to him too much about it. He talked very very lovely and he would answer our questions but in bringing up anything as to his condition we didn't do that because in our estimation he didn't seem to want to talk about it. If I may explain [105] one incident, my husband is a salesman and he made the remark that under the conditions——

The Court: Not what your husband said, you are not permitted to state that.

Q. Just describe Mr. Johnson's appearance on those occasions?

Mr. Casterlin: I think I will object to that question on the ground that his appearance would have nothing to do with this case after March 20, 1951.

The Court: I took it that this testimony was concerning matters in the spring of 1951 before March 20th.

Mr. Racine: That is my understanding.

The Court: Because we are still trying out the matters of right to bring this suit. You may testify as to matters in the spring prior to March 20, 1951.

Q. When he first came out of the hospital, will you describe his appearance?

A. The first time we visited Mr. Johnson, to me it was pathetic. He didn't seem like he had too much in the future, he didn't look happy to me. We didn't talk to him or force him to talk, we just commented as to how grateful we were to see him.

Mr. Casterlin: I think I will object to this as not being responsive. [106]

(Testimony of Violet Rae Waldrun.)

Mr. Racine: Just describe his personal appearance.

A. He had a confused look in his eyes.

Q. What was his face like?

A. The expression on his face wasn't good, it to me was an expression of wonderment as to what would be the outcome.

Mr. Casterlin: I think I will move to strike that as expressing an opinion as to what was in the mind of Mr. Johnson.

The Court: The motion will be denied.

Q. Will you state on the occasion of the first visit whether or not Mr. Johnson, in any conversation you had with him, talked or discussed matters with you rationally?

A. I cannot answer that exactly but I can say to this extent that we didn't discuss anything with him, we didn't talk to him much because we felt that he didn't care to talk about it and we could see that he didn't care to talk to us.

Q. Did he offer to talk to you?

A. No, he didn't.

Mr. Racine: You may inquire.

### Cross Examination

Q. (By Mr. Casterlin): Do you know when Mr. Johnson left the hospital?

A. I know he left for Christmas Day, we were there before [107] Christmas and he left to come home for Christmas Day.

Q. On this occasion or occasions that you were

(Testimony of Violet Rae Waldrun.)

visiting with him, I assume they were shortly after Christmas?

A. No, we were there before Christmas at the hospital.

Q. Now, when he was at home do you recall when he came home?

A. No, only for Christmas.

Mr. Racine: I wonder if the witness isn't confused about the question.

Q. Now, Mrs. Waldrun, what do you mean by coming from the hospital, do you have reference to this time he came home for Christmas Day?

A. No, the only thing I know,—I didn't keep track of when he came home, I knew he was home for Christmas and went right back.

Q. Do you know when he was discharged from the hospital and didn't have to go back?

A. No, I don't.

Q. Could you fix any date that you were there and had a talk with him?

A. No, sir.

Q. You don't know whether it was before March 20, 1951, or after?

A. I know that it was in March, in the spring.

Q. Was it the latter part of March?

A. Before the 15th or through there. I cannot say exactly [108] the date but I know it was after he came home in March.

Q. Isn't it a fact that you didn't care to discuss his accident to renew his memories? Isn't that the reason that you refused to talk to him?

A. No.

(Testimony of Violet Rae Waldrun.)

Q. Isn't it a fact that everybody that was there with him avoided the subject of his having lost his arm and his legs?

A. It might have been, we didn't do that.

Q. You didn't talk to him about that?

A. No, we didn't.

Q. That was one of the things that you avoided?

A. We didn't discuss the conditions with him.

Q. What did you talk about with him?

A. We talked about the fine weather we were having and how nice it was for him to be back again so that he could go to church and enjoy life.

Q. He understood what you were talking about?

A. I don't think that he did, if he did he didn't show it.

Q. Did he join in the conversation?

A. Not too much.

Q. Did he ask any questions?      A. No.

Q. Mrs. Waldrun, you have stated that you were interested in the Johnsons. I assume that you are interested in the outcome [109] of this lawsuit?

A. I certainly am.

Q. And you would certainly like to see Mr. Johnson prevail and win out?

A. I certainly would.

Mr. Casterlin: That is all.

### Redirect Examination

Q. (By Mr. Racine): What you have testified and stated here, are they the facts, what you knew about?      A. Will you state that question again?

(Testimony of Violet Rae Waldrun.)

Q. You have testified here as to facts that you knew, is that right?

A. They are facts that I knew.

Mr. Racine: That is all.

Mr. Casterlin: That is all.

### H. P. STEARM

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Racine): Where do you reside?

A. 722 West Cedar, Pocatello, Idaho.

Q. What is your profession?

A. Associate professor of Political Science at the Idaho State [110] College.

Q. When did you first become acquainted with LaVerl Johnson?

A. About the first part of June, 1951.

Q. What were the circumstances under which you first became acquainted with Mr. Johnson?

A. He entered my classes at college. He came in as a pre-legal major.

Q. Did you have occasion to observe Mr. Johnson in classes?      A. Yes, sir.

Q. What did you observe about him at that time?

A. He enrolled in summer school and he was pushed into the classroom by students there. During the time that we were having lectures or dis-

(Testimony of H. P. Stearm.)

cussions he was ill at ease and perspiration continually poured down his face.

Q. What is the fact as to whether he participated in classes?

A. He did not participate in classes.

Q. What is the fact as to whether he took any examination?

A. The first examination we gave about two weeks after he enrolled in the class, after the semester started. As I gave out the questions I noticed that he was again in that very high emotional state, perspiring freely. When I gave the questions out I watched Mr. Johnson very closely, I anticipated that he might have trouble. About ten minutes after the class started,—after the test started Mr. Johnson threw his pencil down on the floor and was very [111] flushed in the face. I walked over and pushed his wheel chair outside the door and I started talking to him.

Q. Mr. Stearm, what is your educational background?

A. I have attended the Kansas State Teachers College at Emporia, Kansas. I also attended the Kansas University, University of Texas and the University of Utah.

Q. What degrees do you hold?

A. I have an A.B. and an M.S. and I am completing work on my P.H.D.

Q. Have you had any training or practical work in psychiatry?

A. Somewhat,—during my term in the Armed

(Testimony of H. P. Stearm.)

Forces, I acted under the supervision of the head psychiatrist and clinic psychologist in the hospital center, I acted as rehabilitation man under their direction.

Q. Where was that?

A. That was at Soissons, France.

Q. And when was it?

A. In World War Two.

Q. During what period of time?

A. That must have been approximately one year. I had training in rehabilitation before I went overseas.

Q. What type of patients were there in that hospital?

A. Extreme surgical cases,—amputees,—mental cases and so on.

Q. What was the nature of your work with those patients? [112]

A. My job as rehabilitation man and also as information man, as the patient was able, through doctors' orders we would give certain type of exercises and care, such as seeing that they got to the movies, books to read and discussions with them, and so on.

Q. Did you have occasion to observe the mental attitude of amputees at that time?

A. Yes, sir, very much.

Q. I will ask you now, Mr. Stearm, based upon your experience and upon your work with other amputees, what you have to say as to the compe-

(Testimony of H. P. Stearm.)

tency of Mr. LaVerl Johnson when you first met him in the summer of 1951?

Mr. Anderson: I think we will object to that, if the Court please, we do not think this witness is qualified to answer. I think this is a medical question.

The Court: He may answer.

A. I was about to ask what the attorney meant by competency.

Q. Just what you observed, what you saw, and as to whether you felt that LaVerl Johnson was able to carry on and transact his business in the normal activities of conducting his own affairs?

A. I would say definitely not.

Q. Will you explain what you observed, as a basis for your opinion? [113]

A. As I mentioned before, when he threw down his pencil, he was very or seemed to be very emotionally upset. I pushed him out into the hallway. In our training in the Armed Services we were told definitely never to show any sympathy toward anyone injured or anyone who had amputations. So with the experience I had had with people like that, I took Mr. Johnson out in the hallway and I gave him a very sound going over. Meaning by that, I didn't give him much of a chance to show any sign of asking for sympathy or feeling sorry for himself. I told him that he was making a very sorry spectacle of himself in acting the way he did in the classroom. I spoke to him for about an hour and a half at that time and in doing so I never let



(Testimony of H. P. Stearm.)

him get a chance to say too much. After about 30 minutes I let him talk to me a little. In reference to that, he told me that he had threatened himself a number of times and that he felt at that time that he was of no value to anyone in this world and that he would like to end it all right now. I made fun of him and I said,—

Mr. Casterlin: —I think we object to the testimony of this witness as a whole and move to strike it on the ground that mental competency is determined as of a time prior to March 20, 1951, and this applies to a period after that.

The Court: If he was in that condition [114] after that time it certainly shows that he had not recovered.

Mr. Casterlin: It would not make any difference whether he had recovered or had not recovered because the suit then would have been brought in time and it would not be material here.

The Court: The objection will be overruled.

Q. You may go ahead, Mr. Stearm?

A. I told him that life was a pretty sweet thing and that the only person he would really be hurting if he tried to end it all as he had threatened, would be his family and his friends. He began to talk more freely with me but at the time he talked very haltingly. As he would speak he would start to say something, stop and rephrase his statement and start over again in a very halting manner. Of course, I tried to make him feel better without showing any sympathy and I think in about an hour

(Testimony of H. P. Stearm.)

and a half he was in a pretty good shape mentally at that time.

Q. Mr. Stearm, did you see him from time to time after that circumstance and occasion that you have related?

A. Yes, since he is a major of mine I have been in close contact with him and also since the condition he was in I have taken a very special interest in his case and worked with him at all times. By all times I mean from [115] day to day over a period of the past two years.

Q. To your knowledge have there been any other occasions that you have had occasion to observe him as to his competency?

Mr. Casterlin: I renew my objection as to this being immaterial. He has established one instance after March 20th and any other instance would be immaterial, after that date particularly.

The Court: The only question we are dwelling on here is whether he should have been barred from having this case heard on account of his condition and on account of the statute of limitation running on March 20, 1951, I believe was the date, without making any further statement I think I will let you go ahead because any condition after March 20th would certainly show that he must have been worse prior to that date. You may answer that last question yes or no.

A. Yes.

Q. Do you have the times in mind?

A. The approximate times, yes, sir.

(Testimony of H. P. Stearm.)

Q. Will you state them?

A. One was a year ago last summer and again last fall.

Q. Will you relate those circumstances?

Mr. Casterlin: I will renew my objection at this time. This case was brought within two years after March 20, 1951, consequently any continuation would [116] be immaterial as to the question of the statute of limitation because the suit was then brought in time and any condition existing on March 20, 1951, would be immaterial.

The Court: I cannot agree with you. I realize the statute of limitation started to run on March 20th and any condition that this man has after that would necessarily, it seems to me, show that his condition prior to that time wasn't much better. I don't want to make any comment, this is for the jury to say as to whether this man should be excused from taking care of his business for the first few months after his injury. I don't want the jury to take any suggestions that they think I might make in regard to this. They have the facts and they know his condition. I think this witness and other witnesses should be allowed to testify to it,—most of it certainly can be observed.

Mr. Casterlin: I object also that it is too remote from March 20th.

The Court: I realize that it is somewhat remote but he may answer.

A. The first occasion was during the summer-time a year ago,—a year ago this past summer, I

(Testimony of H. P. Stearm.)

took LaVerl with me fishing. During this trip as he went to bed that night he took a pistol out of his car and placed it under his pillow,— [117] actually it was under his coat that he had out there. I asked LaVerl the purpose of the pistol,—was it to protect himself in case of bears or what. We talked quite a bit around the camp fire and I believe it was at that time that he told me that he used the pistol in case that he should get himself injured or in any way was not able to take care of himself that he would shoot himself,—that he had carried this pistol ever since he was able to get about, for that purpose. At that time he mentioned that he had several times got on his horse to go in the hills with the idea of shooting himself,—shooting his horse first and shooting himself after he killed his horse. The next occasion was in either the late fall or early winter of last year. If the date is important I could look it up. We took a group of students to the University of Utah to hear a speaker at the Pi Sigma Alpha annual dinner. Mr. Johnson and his wife were both there at that time. Mr. Johnson came to me in rather an embarrassed way and asked if I would go with him; he seemed rather disturbed about something. I went into the rest room with him and at that time Mr. Johnson said, “I am not very much good for anything.” He said, “I wish you would help me.” And I said, “What is the matter, LaVerl?” And he said, “I can’t wash my hand and we are going in to lunch.” And I said, “Certainly, I will be glad to wash your

(Testimony of H. P. Stearm.)

hand for you." [118] Before the group was around I scrubbed his hand so that he could go in to dinner and eat. So far as any definite threat is concerned, he didn't make any at that time. He just suggested or said that he would be better off dead.

Mr. Racine: I think you may inquire.

### Cross Examination

Q. (By Mr. Casterlin): Mr. Stearm, in the course of your work I assume this is not the only instance where you have seen students that were ill at ease and were perspiring when they were posed for an examination?

A. Most of them are ill at ease but they don't perspire as profusely as Mr. Johnson did.

Q. Where did you get your M.S.?

A. It was a M.A.

Q. I thought you said M.S., pardon me.

A. Well, I may have but that was an error, it was a M.A.

Q. Where did you get that degree?

A. At the Oklahoma A. & M.

Q. Did you get that as a result of seminar or a written examination?

A. I got my M.A. both by,—well, we take the seminar, that is a course that we take for written work.

Q. Yes, I have an M.A. also and I was just wondering if you had the same experience that I did. Now, did you get your [119] M.A. as a result

(Testimony of H. P. Stearm.)

of an open examination in seminar or as a result of a written examination?

A. I took a written examination covering four fields of Political Science and then took an oral examination over my master's thesis before a board of five members.

Q. And I presume you were not ill at ease or nervous when you went before all of these professors and students for the oral examination?

A. No, not the oral examination because I had written on a subject that possibly few people knew much about and I figured that I knew more about that subject than the professors did.

Q. That is an unusual situation. Would you say, Mr. Stearm, that because a person is ill at ease under certain circumstances that he is mentally incompetent to transact his own affairs within his own sphere of activity?     A. No, sir.

Q. Would you say that because a person perspires that he is incapacitated to transact his own business within his own sphere of activity?

A. No, sir, but may I explain that?

Q. Yes, you may.

A. In a case of people who have amputations I have observed that they do in emotional states perspire more profusely than persons who have not had amputations. [120]

Q. Isn't it a fact any person, whether he is an amputee or not, perspires in the event of an emotional upset?     A. I would imagine so, sir.

Q. When you speak of the emotional upsets that

(Testimony of H. P. Stearm.)

Mr. Johnson has had; you mentioned one that occurred when he took his first examination in 1951, now, there was a complete recovery from that, was there not?      A. In what way do you mean?

Q. You said that you took him out and talked to him and let me ask if he recovered from that emotional upset then?      A. Yes, sir.

Q. And then you testified that he had another one along in the summer of 1952; he recovered from that emotional upset, didn't he?      A. Yes, sir.

Q. After his recovery from that emotional upset you would not say that he was mentally incompetent to transact his own business within the sphere of his own activity, would you?

A. I think that I would not be in a position to say whether he was or was not.

Q. Now, last fall, that would be the fall of 1952 or 1953?      A. 1952 is what I referred to.

Q. There was nothing about his asking you to wash his hands which would indicate to you that he was mentally incompetent [121] to perform his own business, to transact his own business within the sphere of his activity, was there?

A. Well, in answering that question, his business at that particular time was washing his hand and he could not do that.

Q. You understand what I have in mind, Mr. Stearm, if he had other spheres of activity within his own life, the fact that he had to have help in washing his hand, that would not drive you to the conclusion that he was mentally incompetent?

(Testimony of H. P. Stearm.)

A. No, the statement that he made at the time is what I referred to, he stated at the time that he would be better off and everyone else would be better off if he was dead or something to that effect.

Q. Have you ever heard people who are not amputees make the same statement in instances of emotional upsets?     A. I imagine so.

Q. The fact that they make that statement; when they recover from the emotional shock, they go back to their normal habit and action?

A. Yes, I guess they do, to their normal action.

Q. It is not unusual for a person to carry a six-shooter in the hills in order to relieve themselves of being caught where they cannot get loose,—that is common practice among hill men, isn't it?

A. I cannot answer that, I know that I would not carry a [122] pistol just to shoot myself.

Q. In cases of extreme circumstances you know that hill people do carry six-shooters?

A. Yes, I know they do.

Q. Have you ever heard them say that they carried them in the event that they slipped on a rock and broke their leg they would not have to lie there and suffer?

A. No, sir, I never have.

Q. You never have heard that?     A. No, sir.

Q. You would not say that if a person made that statement that he was not competent to transact his business if he was a farmer on a farm, would you?

A. I think the question of whether a man is



(Testimony of H. P. Stearm.)

mentally incompetent or not is not within my sphere to answer over a period of years; at the time that I am speaking of he was definitely emotionally upset.

Q. You would not say that because of the three instances of emotional upset that Mr. Johnson was mentally incompetent to transact the business in which he was engaged in his own sphere, his own normal average daily life?

A. No, not from those alone but from knowing Mr. Johnson for the time that I have known him and observing him on the occasions and observing his actions up to that time I would say that he was definitely incompetent at that [123] time.

Q. At that particular time? A. Yes, sir.

Q. You have stated that you have a special interest in his case, I assume that is correct?

A. Yes, sir.

Q. You have that interest so that you would really like to see him win in this case?

A. You are misinterpreting my words; in referring to his case I was referring to him as a student at the Idaho State College.

Q. I see, but as a matter of fact you would like to see him win this lawsuit?

A. Only if he is meeting the requirements of the law.

Mr. Casterlin: Thank you, that clears that up. I believe that is all.

Mr. Racine: That is all.

LAVERL JOHNSON

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is LaVerl A. Johnson?     A. Yes, sir.

Q. Have you ever been a witness on a witness stand before? [124]     A. No.

Q. Then, Mr. Johnson, will you speak up as best you can and address your remarks to the jury. Where do you live?

A. I live at 168 Jones Drive, Pocatello.

Q. Where did you live on or about November 4, 1950?

A. I lived at 38 Orchard Drive, Pocatello, Idaho.

Q. Where were you employed on that date?

A. I was employed at the Pacific Fruit Express Company.

Q. Was that here in Pocatello?     A. Yes.

Q. What was your age on November 4, 1950?

A. I was 23.

Q. Were you married then?     A. Yes.

Q. To whom?     A. To Joleen.

Q. How long had you been employed at the Pacific Fruit Express prior to November 4, 1950?

A. I am not certain of the dates but I would say that it was approximately two years over-all.

Q. Approximately two years, you say?

A. Yes.

(Testimony of LaVerl Johnson.)

Q. What was the nature of your employment or work at that time?

A. At that immediate time?

Q. What were your general duties on that day and prior to [125] that day?

A. I was a repairman for the Pacific Fruit Express Company.

Q. And as a repairman state briefly what you did?

A. Well, we repaired almost anything of a minor nature that would become unserviceable.

Q. Were you an electrician then?

A. No, I wasn't.

Q. Did you have any knowledge of electricity?

A. Very little.

Q. Had you ever worked around high voltage electricity? A. No.

Q. What happened that day, LaVerl, as to any of the electrical power at the Pacific Fruit Express Company?

A. Well, the electricity was turned off at the plant.

Q. What is the fact as to whether or not you saw anyone around there working on the electrical equipment? A. Yes, sir, I did.

Q. Who did you see, if you know?

A. I don't know who it was, but it was someone foreign to the Pacific Fruit Express employees right there.

Q. To your knowledge were there any electri-

(Testimony of LaVerl Johnson.)

cians at the Pacific Fruit Express plant on November 4, or prior to that time?

A. Well, not any Pacific Fruit Express employees.

Q. There were no electricians? [126]

A. Not Pacific Fruit Express employees, no.

Q. Had you ever had occasion to observe men working on the electrical apparatus prior to November 4, 1950, around the plant?

A. I have seen men work with electricity around there but I didn't know who they were, they were not employees from our company there.

Q. What did you do that day, on November 4, 1950, so far as the electrical equipment was concerned and why did you do it?

A. Well, I was instructed to paint those electric cables that go into the transformers, by Mr. Johnson, I had been painting them most of the morning on one particular transformer cage until it satisfied him as being a complete job on that particular cage——

Q. ——Will you speak just a little louder, LaVerl?

A. Yes, and about noon Mr. Johnson came along and gave me the keys to this other transformer cage and I was instructed to paint it as I had painted the other one. Paint all the bare wires, re-dress them.

Q. What were you told as to whether the power was off or on?

A. I was told, by Mr. Johnson, that this was

(Testimony of LaVerl Johnson.)

the only day we would have the power off and that the power was off.

Q. Where did you see other men working on the electrical equipment around there that day?

A. My first observation was that he was inside of this transformer cage and they had one of them open. Later on in the afternoon or that morning I saw them in the other transformer cage looking into another one.

Q. And what is the fact as to whether or not you at any time saw this man whom you didn't recognize as a Pacific Fruit Express Company man, working around in the place where you were injured?

A. Yes, I had observed him working in there; he was in the cage working that morning while I was in the other one.

Q. Who did you call, prior to November 4, 1950, —you and the other workmen whenever there were power failures?

A. Well, in case of any power failure there was a number for us to call. It was for the Union Pacific Substation there, and there would be someone there to find out what the trouble was.

Q. Where was that number located, was it posted somewhere?

A. Yes, it was posted near the telephone.

Q. And where was that?

A. That was inside one of the engine rooms.

Q. In the engine room at the Pacific Fruit Express plant?

A. Yes, in the engine room.

(Testimony of LaVerl Johnson.)

Q. Now, LaVerl, just tell the Court and jury what you did on that day, November 4, 1950, so far as you remember just before you were injured?

A. Just prior to going to lunch Mr. Johnson instructed me to,—after he gave me the keys he instructed me to go into this cage and paint it as I had painted the other; then I went to lunch. After I came back from lunch I mixed my paints and the stuff that I was to put on the wires and I proceeded to enter the cage and I walked around to work from the back side to the front so that I would not be rubbing paint on me all of the time. Upon going to paint the first wire I got hold of this one that had never been de-energized.

Q. And what do you next remember?

A. Well, I remember being in the hospital.

Q. Do you know how long you were in the hospital?

A. Well, I was in the hospital until either February or March of the following year.

The Court: At this time we will adjourn until 10 o'clock tomorrow morning.

November 20, 1953, 10:00 o'clock a.m.

Mr. Casterlin: At this time, if the Court please, the defendant waives its defense of the statute of limitations and asks that all of the allegations alleging the statute of limitations being stricken from its answer, which is the second defense in the answer, and also moves at this time, in view of that motion, that all of the exhibits from 1 to 13 be

stricken as [129] they pertain solely and only to the defense of the statute of limitation. In this connection I wish to assure the Court that this motion comes at the very first opportunity that we have had to observe the hospital records for anything concerning the handling of this case in the hospital through the doctors or otherwise, because this is confidential and we could not obtain the records had we sought to do so, and after examining the records we decided to take this move. Having now examined and investigated the records which we did not have an opportunity to see before, we make this motion. I assure the Court that this defense was made originally in good faith for want of information and we ask now that the Court instruct the jury appropriately with respect to this defense, in respect to the evidence and the testimony offered that they are not to consider it further in connection with this case as to the plea of incompetency or representation; that the case now has assumed one strictly of negligence under the allegations in the complaint. \* \* \* \* [130]

The Court: Ladies and gentlemen of the jury, I think you understand just as fully as the Court will be able to explain it to you that the defendant, Union Pacific Railroad Company, has withdrawn its defense of the statute of limitation. In other words, they have consented that the plaintiff had the right to sue regardless of the statute of limitation which provides that an action must be filed within two years,—so that leaves you in the position of determining what part of the evidence which you

have heard here for the last two days pertains to the statute of limitation and what part pertains to the question of humiliation and disability, pain and suffering of the plaintiff in this case. All of the testimony, the letters back and forth to the Industrial Accident Board; the conversations with the claim agents and examiners of the Union Pacific Railroad. In fact all of the exhibits that have been introduced here in evidence that pertain to the ability of Mr. Johnson to figure out his business affairs to the extent that he would have been able properly handle his affairs in regard to his accident so that he could have filed his suit within the time limited by statute,—all of that testimony is not material now in view of the position taken by the Railroad Company to withdraw this defense. It is the duty of the jury to eliminate that evidence from their minds. [131] I want to make it clear,—this does not strike the testimony so far as it pertains to Mr. Johnson's condition, such as his disability, pain, suffering, humiliation and things of that kind.

I am going to strike all of the exhibits except those pertaining to the hospital records; that is,—they will not be admitted for any purpose except to show the length of time that he was in the hospital and the treatment that he received at that time. It may be necessary later in this case for me to give you further instructions in regard to those exhibits but they are so cumbersome that the Court will have to go through them and determine what will be eliminated. In fact I would eliminate all of them at this time except that it might place the plaintiff



in the position of having to return some the nurses and some other witnesses to testify in regard to some parts of those records.

Because of the turn that this case has taken, I am going to permit the plaintiff to put on one additional witness today because his business affairs are such that he must or should get away, and then I will recess this case until Monday morning.

I don't want any of the jurors to worry about Thanksgiving because we will recess or adjourn for Thanksgiving Day if we have not finished by that time. [132]

Now, do you gentlemen feel that I have covered the matter sufficiently?

Mr. Racine: Yes, we do.

Mr. Casterlin: Yes, your Honor.

The Court: And the record may show that Mr. Johnson is withdrawn from the witness stand at this time.

#### IRVING J. ESKELSEN

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Phillips): Your name is Irving J. Eskelsen? A. Yes, sir.

Q. Where do you reside, Mr. Eskelsen?

A. 625 West Halliday, here in Pocatello.

Q. What is your occupation?

A. Electrical foreman for the Union Pacific at Pocatello.

(Testimony of Irving J. Eskelsen.)

Q. That is in the Union Pacific Railroad shops in Pocatello?     A. Yes, sir.

Q. How long have you been in that position?

A. Approximately seven years.

Q. During that time you have read meters measuring the delivery of electricity by the Union Pacific to the [133] Pacific Fruit Express Company here in Pocatello?     A. That is right.

Q. That is done at least once each month?

A. Yes, once each month.

Q. Where is the meter at the Pacific Fruit Express Company ice plant in Pocatello located?

A. It is in the inclosure of what we call twelve point five substation.

Q. With respect to the Pacific Fruit Express Company ice plant, what direction from that plant would that be?

A. I would say that it was south.

Q. In a southerly direction?     A. Yes.

Q. Who, if anyone, goes into the substation with you when you read the meters?

A. An employee of the Pacific Fruit Express Company.

Q. Will you state, if you know, who those persons are?

A. They are various persons. Mr. Shoup has been one, and Mr. Johnson and one of the assistant plant engineers whose name I don't recall.

Q. They go in with you each month to read the meters?     A. Yes, sir.

Q. Are they electricians?

(Testimony of Irving J. Eskelsen.)

A. I really cannot answer that question,—I don't know their qualifications.

Q. You never made any inquiry as to their qualifications? [134] A. No, sir.

Mr. Phillips: That is all.

### Cross Examination

Q. (By Mr. Anderson): Is that all of the functions that you perform, reading the meters in that substation? A. Yes, sir.

Q. And that is for the purpose of determining the amount of electrical energy delivered?

A. Yes, sir.

Q. The line that delivers energy to that substation comes across the track?

Mr. Phillips: We object to that as improper cross examination and not within the scope of the direct examination.

The Court: The objection is sustained.

Q. Do you have a key to that substation?

A. No, sir.

Mr. Phillips: We object to that on the same ground, that it is not proper cross examination and it is not within the scope of our direct examination.

The Court: I guess that is doesn't make any difference whether he has a key or not, I will let the answer stand.

Q. You do have to get someone from the Pacific Fruit Express [135] to unlock the gate to let you in? A. Yes.

\* \* \* \* \*

The Court: Very well, however, I would like it understood that if they are to be called that we do not have to wait on them. I am sorry to do this, ladies and gentlemen of the jury, but I think that we can finish this case within three days starting Monday [136] morning, so the Court will adjourn at this time until Monday morning at ten o'clock. I want to again remind you as I did at the onset of this trial, you are not to discuss this matter among yourselves or with anyone else or to permit anyone to discuss it in your presence. If anyone does mention this case you will politely and quietly tell them that you are a member of the jury and that they should not discuss it in your presence. If they say anything further you will report them to the Court. I want to also admonish everyone, witnesses and others connected with this case, that they should not embarrass the jury by discussing the matter in their presence. We will adjourn until ten o'clock Monday morning.

November 23, 1953, 10:00 o'clock a.m.

TONY TOFENELLI

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your name is Tony Tofenelli?            A. Yes, sir.

Q. Where do you reside, Mr. Tofenelli?

A. 904 West Young. [137]

(Testimony of Tony Tofenelli.)

Q. Where were you residing November 4, 1950?

A. At the same place.

Q. What was your position or occupation on that date?      A. I was an iceman.

Q. For whom were you employed?

A. The Pacific Fruit Express.

Q. Here in Pocatello?      A. Yes.

Q. For what period of time were you employed in that position?

A. Six years I worked for them.

Q. Have you ever been a witness before?

A. No.

Q. Well, now, I will ask you to speak up loud enough so that the Court, the jury and all of us can hear you. What is the fact, Mr. Tofenelli, during the time that you were employed at the Pacific Fruit Express ice plant as to whether or not there were electricians employed at that place, to your knowledge?

A. To my knowledge there wasn't.

Q. To you knowledge who did the electrical work there at the plant,—during the time that you were employed there?

A. The Union Pacific Railroad electricians did their electrical work.

Q. And what is the fact as to whether or not you have seen such individuals around the plant?

A. I have seen them around there, yes, sir.

Q. What was the fact as to your instructions as an employee out there, regarding electrical difficulties?

(Testimony of Tony Tofenelli.)

A. At any time anything went wrong we were supposed to call,—we would go to the engine room and there there was a telephone number that we were supposed to call.

Q. And who was it that you called?

A. It was the railroad.

Q. Have you been at the plant prior to November 4, 1950, when any Union Pacific electricians were present?     A. Yes, sir.

Q. Will you state the circumstances as you recall them?

A. There have been a few times that I was in this place,—

Q. —What place are you referring to?

A. Where the transformers are.

Q. Where the transformers are?

A. In this cage where the transformers are.

Q. And where is that?

A. At the Pacific Fruit Express.

Q. Where from where the ice plant is?

A. Next to the ice plant.

Q. Is it south of the ice plant?     A. Yes.

Q. It is in a separate enclosure?

A. Yes. [139]

Mr. Racine: I would like to have these exhibits marked and I will ask the clerk what numbers they have.

The Clerk: 14 to 17.

Mr. Racine: We desire at this time to introduce in evidence Exhibits Numbered 14 to 17, being photos previously furnished to us by the defend-

(Testimony of Tony Tofenelli.)

ant,—they are enlargements of photos furnished to us.

The Court: Is there any objection to these exhibits?

Mr. Anderson: We have no objection except that they have taken out Plaintiffs' Exhibit No. 15.

Mr. Racine: That was simply a duplicate.

The Court: The others, 14, 16 and 17 may be admitted.

Q. Mr. Tofenelli, you have been handed what are marked as Plaintiffs' Exhibits 14, 16 and 17. I will ask you whether or not, to your knowledge, those photos and exhibits fairly illustrate this sub-station of which you have spoken?

A. Yes, sir, they do.

Q. And what is the fact as to whether or not you have personally been inside of that sub-station?

A. I have been in there.

Q. Will you relate to the Court and jury what the circumstances were under which you have been in that sub-station? [140]

Mr. Anderson: We object to that as immaterial.

The Court: Well, I cannot tell at this point, I will let him answer.

A. I have been in this sub-station to cut weeds and to spread gravel and to do a few other things.

Q. Who have you been in the sub-station with?

A. I have been in there with Mr. H. O. Johnson, Mr. Shoup, and Mr. Jim Johnson.

Q. Have you been in there with any other person?

(Testimony of Tony Tofenelli.)

A. Yes, I was there when there was an electrician in there.

Q. Will you talk a little louder, Mr. Tofenelli, I couldn't hear you?

Mr. Anderson: I again object, that it is incompetent, irrelevant and immaterial and doesn't run to any issue in this case and does not pertain to the plaintiff, Mr. Johnson.

The Court: I cannot tell what his answer is going to be, I will let him answer.

Mr. Racine: I am not sure whether the question was answered or not, Mr. Reporter, will you read the last question and if there was an answer will you read it.

(Question and answer read by reporter.)

Q. And do you know by whom the electrician was employed?     A. By the U.P. [141]

Q. Did you observe any Union Pacific trucks around the sub-station from time to time?

A. Yes, sir, I have.

Q. And what is the fact as to whether or not the trucks were connected with the electricians that you observed there?

A. On the side of the truck they had Union Pacific Railroad Maintenance of Way and from that I took it that they were Union Pacific trucks.

Mr. Anderson: I move to strike the last portion as to what he took them to be.

The Court: Yes, that may be stricken, the jury will decide that.

Q. And what is the fact as to whether or not



(Testimony of Tony Tofenelli.)

the electricians, the Union Pacific employees, came in the trucks or truck that you spoke of?

A. Yes, I think they did.

Mr. Racine: You may examine.

### Cross Examination

Q. (By Mr. Anderson): What were your duties, Mr. Tofenelli, out at the Pacific Fruit Express? A. I was an iceman.

Q. By iceman what do you mean, what did you do? A. I iced the cars.

Q. You were up on the dock and put ice in refrigerator cars? [142] A. That is right.

Q. And is that where you spent most of your time, up on the ice dock?

A. Yes, the biggest part of it.

Q. What did you do when you were not up there working on the ice dock, do you do anything at those times?

A. Generally cut weeds.

Q. On the Pacific Fruit Express property?

A. Yes, sir.

Q. You worked for the Pacific Fruit Express Company? A. Yes, sir.

Q. And you didn't work for the Railroad Company, did you? A. No, sir.

Q. When was it when you saw some railroad electricians doing some work there?

A. I cannot tell the date.

Q. But you are speaking about a time prior to November 4, 1950, aren't you, in your testimony?

(Testimony of Tony Tofenelli.)

A. Yes, sir.

Q. About when was it?

A. Well, I have seen there off and on, they come in and drain the oil out of these condensers and put new oil in them.

Q. When was that, can you tell?

A. No, I cannot.

Q. How do you know that they were Union Pacific electricians? [143]

A. Just by the truck.

Q. Just by the truck?                    A. Yes, sir.

Q. Now, about those instructions; did you ever call any electricians over there yourself?

A. No, sir.

Q. You had nothing to do with that?

A. No, sir.

Q. But you do know that they did not come unless they were called, don't you?

A. Well, no, I don't.

Q. You don't know about that?

A. No, I do not.

Q. Do you have any information at all as to what the arrangement is as to any electricians doing work for the Pacific Fruit Express?

A. No, sir, I don't.

Q. How did you get into the sub-station whenever you went in there?

A. There is a gate there and it is usually locked.

Q. Did somebody furnish you a key or did they open it for you?

A. They opened it for us.

(Testimony of Tony Tofenelli.)

Q. And would that be Mr. H. O. Johnson or Mr. Shoup? A. Yes, sir.

Q. And when you left there was it locked again?

A. Yes, generally.

Q. You stated that you were in there with an electrician, a Union Pacific electrician, who was that, can you tell me?

A. No, I don't know the fellow, we was in there cutting weeds one day when they came in.

Q. And what did they do?

A. Well, like I said before, they took the top off this transformer and they filled it up with oil. I believe they took the old oil out and put new oil in.

Q. About when was that, can you tell me?

A. I have seen them do it off and on but I cannot tell the dates.

Q. Off and on what,—off and on over a period of six years? A. Yes.

Q. Mr. H. O. Johnson, Mr. Shoup and Jim Johnson, they were all officers or employees of the Pacific Fruit Express Company? A. Yes.

Q. And I think Mr. H. O. Johnson is since deceased, do you know that? A. Yes, sir.

Q. This sub-station is enclosed with a high wire fence? A. Yes, sir.

Q. And it sets out in the open so that anybody can come around it whether they are railroad employees or Pacific Fruit [145] Express Company employees?

(Testimony of Tony Tofenelli.)

A. They can come around it but they cannot get inside of it.

Q. What is the dimension of that, do you know?

A. No.

Q. Would it be about 30 feet square, would you say?     A. It could be that, yes.

\* \* \* \* \*

### MELIO TOFENELLI

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Racine): Will you state your full name?     A. Melio Tofenelli.

Q. And have you ever been a witness before?

A. No, sir.

Q. Then I will ask you to speak up and direct your remarks to the jury, if you will.

A. Yes, sir.

Q. Where are you employed at this time?

A. For the City of Pocatello. [146]

Q. Where do you live?

A. 635 West Sublet.

Q. Where were you employed on and before November 4, 1950?

A. At the Pacific Fruit Express Company ice plant, Pocatello.

Q. For what period of time were you employed there?     A. Two years.

Q. What was your work there?

A. Iceman.

(Testimony of Melio Tofenelli.)

Q. Your brother was working there as well at that time?      A. Yes, sir.

Q. And is your brother employed by the city now?      A. Yes, sir.

Q. Were you working at the ice plant on November 4, 1950?      A. Yes.

Q. What is the fact, to your knowledge, as to whether there were electricians working at the Pacific Express plant on November 4, 1950, or prior to or on November 4, 1950?

A. There was none.

Q. There were no electricians working for the Pacific Fruit Express?      A. None.

Q. What is the fact as to who did the electrical work around the ice plant prior to November 4, 1950?

A. It would be the Union Pacific.

Q. Had you seen such men at the plant working? [147]      A. Yes.

Q. How frequently?

A. Sometimes once a month and sometimes twice a month.

Q. Where did you see them working there?

A. Out in the cage where the transformers are located.

Q. Where is that located?

A. South of the ice plant.

Q. What is the fact as to whether or not the cage of which you spoke is in the enclosure which surrounds the ice plant itself?

A. In don't know just what you mean.

(Testimony of Melio Tofenelli.)

Q. Well, is it in a separate enclosure?

A. Yes.

Q. Where did you go to work on November 4, 1950?

A. I went to work at the ice plant.

Q. I meant to ask when did you go to work on that date?

A. I went about eight o'clock in the morning,—at eight o'clock.

Q. State whether or not you observed any men inside of the sub-station to which you refer here?

A. Yes.

Q. The sub-station just south of the ice plant?

A. Yes, when I punched in at eight o'clock in the morning I went through the lunch room, just a little place out east of the tracks. I was sitting there looking out and I seen [148] H. O. Johnson and another man there with a little pick-up truck working inside of the cage and the power was still on at that time, they were inside of the cage.

Q. Now, you mentioned a truck, will you describe that truck?

A. It was a small pick-up truck and it had U.P.R.R. Maintenance of Way on the side.

Q. Where was that with regard to the sub-station?

A. Parked along side of the sub-station.

Q. After you saw these men in there, what did you do, what were your duties?

A. We had to go up north of the tracks to pick

(Testimony of Melio Tofenelli.)

up the weeds and stuff like that, sticks and weeds and stuff like that.

Q. About when did you observe that the power was off?

A. Later on someone said that the power was off and that they was doing some work.

Q. Prior to November 4, 1950, Mr. Tofenelli, while you were working at the ice plant, what, if any, instructions did you have regarding electricity generally?

A. There is a place in the engine room right above the telephone, there is a number to call in case there was anything wrong.

Q. And what is that number?

A. 268, Extension something.

Q. Did you understand what place you would be calling? A. No. [149]

Q. Do you know what Number 268 is?

A. It is the U.P. number.

Q. What was that answer?

A. It was the U.P. number.

Q. And by U.P. you mean Union Pacific Railroad Company?

A. Yes, sir, Union Pacific Railroad Company.

Q. Later that day, that is, in the afternoon did you have occasion to observe the sub-station further. Did you look at the sub-station later that afternoon? A. Yes.

Q. Will you state to the Court and jury the circumstances as to that,—where you were located?

A. There was an H. F., what we call a train

(Testimony of Melio Tofenelli.)

coming on track one, it was a 30 per cent frozen food and we were getting ready to ice it. Just as it stopped I got on the deck of this 30 per cent icer, —the box car, I was getting ready to ice it and this was right direct across from me and I seen a bunch of smoke in this transformer cage.

Q. Now, just a moment,—how far is it from the dock where you were located over to this sub-station?     A. I would say about 75 yards.

Q. That is your best estimate?     A. Yes.

Q. All right, now proceed and tell just what you saw?

A. Our foreman was there and I asked him, what is that burning,— [150] it smelled similar to flesh burning and he glanced over there and then he runs up a couple of car lengths from where I was and he comes back running and hollered at me and said, “It is Johnson”. I don’t know which Johnson it was and so I follow him down the steps to the office and he went in and called someone, I didn’t know who he called. I went over to the transformer cage and there was LaVerl Johnson, he was unconscious, he wasn’t moving or anything, just laying there and his shoes was on fire, smoking.

Q. Where was he lying?

A. He was right there by the lightning reactors.

Q. Inside the cage?     A. Inside the cage.

Q. What did you do then?

A. There was nothing that I could do until we got some help.



(Testimony of Melio Tofenelli.)

Q. Did you know anything about the electricity or the electrical apparatus inside the sub-station?

A. No.

Q. What resulted after that, Mr. Tofenelli?

A. Right after that there was this little fire engine and the ambulance came, they raised the wire with an ice pick, what we use to break up the ice, and then they hooked him in the belt and drug him out of the cage.

Q. Who did that?

A. I think it was one of these firemen. [151]

Q. Prior to November 4, 1950, Mr. Tofenelli, had you at any time been inside the sub-station?

A. Yes.

Q. Will you state to the Court and jury what were the circumstances of that?

A. We was in there cutting weeds while there was this little Union Pacific Railroad pick-up there. They was changing the oil in these transformers, I think.

Q. What is the fact when you were inside the sub-station with the electricians, you had been given any instructions as to the equipment or the apparatus in there?

A. No, they never told us nothing about it.

Mr. Anderson: We move to strike that answer on the ground that it doesn't appear in the record who he is referring to when he said they got no instructions.

The Court: It may be stricken because it doesn't

(Testimony of Melio Tofenelli.)

amount to anything. He said that he had no instructions.

Q. Now, Mr. Tofenelli, after you observed the men in the sub-station on or about eight o'clock on November 4, 1950, did you see Mr. Johnson with this man or men later on that day?      A. Yes.

Q. Will you tell the Court and jury about that?

A. I saw him at least three or four times. I don't know where [152] he was going, whether he was going to the car department,—they have a little sub-station over there too, or whether he was going over there and back to this one at the P.F.E. ice plant.

Q. How was he traveling around?

A. In this little pick-up that had Union Pacific Maintenance on the side of it.

Q. Who was driving the pick-up?

A. This Union Pacific man.

Q. If you know, tell us whether on November 4, 1950, there was an inspection of this electrical equipment out there at the plant?

A. I don't think there was.

Q. Did you see this man at various places where there was electrical equipment around the plant on November 4, 1950?      A. Yes, sir.

Mr. Racine: That is all.

#### Cross Examination

Q. (By Mr. Anderson): How did you know that these men were Union Pacific employees?

A. By their pick-up.

(Testimony of Melio Tofenelli.)

Q. That is the only way that you determined whether they were railroad employees or not?

A. Yes.

Q. Just by the pick-up truck? [153]

A. Yes, sir.

Q. How often did you go into the cage to cut weeds? A. I guess about three times.

Q. While you were working at the Pacific Fruit Express? A. Yes.

Q. How long did you work there?

A. About two years.

Q. Who else was in there with you when you went in to cut weeds?

A. H. O. Johnson and this Union Pacific man with the pick-up truck working on these transformers, they were changing the oil.

Q. Every time you cut weeds they changed the oil? A. Not necessarily.

Q. What is the fact, did they change the oil every time you cut the weeds? A. No.

Q. When did you see them change the oil in the transformers?

A. I can't name the date.

Q. Approximately,—prior to November 4?

A. I don't know what month it was,—I never kept track of the time.

Q. There was just the one time that you saw them?

A. I have seen that about three times in the period that I was there, about two years. [154]

(Testimony of Melio Tofenelli.)

Q. How did you get into this sub-station, who let you in?      A. Howard Johnson let us in.

Q. He was assistant plant manager of the Pacific Fruit Express?      A. Yes, sir.

Q. He didn't work for the railroad company?

A. No, sir.

Q. Is it your understanding that Mr. H. O. Johnson was the only one that had a key to the sub-station?

Mr. Racine: That is objected to as improper cross examination, this witness was not asked as to any key to the sub-station.

The Court: He may answer if he knows.

A. I don't know. I know the only time that we went in the place was when Howard Johnson opened the lock and let us in.

Q. Whenever you saw any of these so-called railroad electricians in the sub-station they were let in by Howard Johnson, the same way that you got in that day, were they?      A. I imagine so.

Q. Who was the foreman that you mentioned that was up on the ice docks?

A. Guy McClellan.

Q. He was also a Pacific Fruit Express Company employee?      A. Yes, sir. [155]

Mr. Anderson: I believe that is all.

Mr. Racine: That is all.

GUY McCLELLAN

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is Guy McClellan? A. Yes, sir.

Q. Where do you reside?

A. 539 North Main Street, Pocatello.

Q. What is your position now and what was it on and prior to November 4, 1950?

A. Shift foreman for the Pacific Fruit Express ice plant at Pocatello.

Q. Where were you on November 4, 1950, during the day time?

A. I was foreman of the ice dock, that is the dock that runs for 87 car lengths between two tracks.

Q. To your knowledge, Mr. McClellan, prior to November 4, 1950, who was called at the Pacific Fruit Express plant or by the Pacific Fruit Express when there was any electrical difficulty out there?

A. The Union Pacific Railroad was generally called.

Q. What occurred on November 4, 1950, with respect to the electricity at the ice plant? [156]

A. I can't say exactly what time it went off. I was told that morning that it was going off, that they were going to turn the power off that morning.

Q. Just relate to the Court and jury the cir-

(Testimony of Guy McClellan.)

cumstances and who was present when you were informed that the power would be off?

A. Well, I was coming from the clock room, Mr. Howard Johnson, the assistant plant manager, was there and told me the power was going off. He said we would have to wait a few minutes and so we stood there talking and this fellow came up, his name I can't remember, that was three years ago and I can't remember his name, but he introduced him as the Union Pacific electrician and said that was the man that he was waiting for before he turned the power off. The time that the power went off I can't tell but I do know that the power went off that morning, I know that there was no heat in the office and there was no power on the platform to operate the chain.

Q. What happened later on that day with respect to the sub-station located just south of the ice plant, as to what you observed or saw about it?

A. Well, I saw this smoke come out of the transformer——

Q. Now, just a moment, where were you at about the time you saw that, when you observed it, and what time was that? [157]

A. Well, to be exact, I said that was about 87 car lengths long, the platform, and it is divided in spots one to 87, and about the middle or close to the middle is spot No. 40, that is approximately the middle of the platform, and about No. 35 is just a little west or north from the spot across in com-

(Testimony of Guy McClellan.)

parison to the transformer, and that is where we were icing this car, at spot 34 or 35. We were hauling ice to this heavy salter,—I just happened to glance over and I saw a little bit of smoke, there wasn't much and I went on down towards this car and I suddenly decided that smoke should not be in the transformer or coming from the transformer if the power was off, and I looked back. I knew that LaVerl Johnson was working on the electricity or on the transformer because I had talked to him earlier that morning. The first thing that crossed my mind was that someone was electrocuted and the only one that could be in there was LaVerl Johnson. So I started down the steps to the office,—I knew that pulmoters and artificial respiration was the best thing for a person who was electrocuted and I rushed into the office and called the fire department. One of the fellows in the office went over to the transformer, he jumped the fence there and went over and he came back and said, "He is dead." I looked over out of the window and I could see that he was moving, his leg was going up and down. I said, "He is still alive." [158] We all rushed out there and I ran into the cage and I was going to pull him out and someone said, "Leave him alone." I didn't know whether to touch that line or not or the arrester, I thought it might get me and so I went back. The ambulance came, the fire department and the pulmotor squad came, and this fellow that was in the office took an ice pick and reached in the fence and put it in LaVerl's belt

(Testimony of Guy McClellan.)

and pulled him off. Then I think the ambulance took him away.

Q. Do you know whether LaVerl Johnson was an electrician?

A. I don't imagine so, I wouldn't say so.

Q. You mentioned that he was working with electricity, do you know what he was doing?

A. He mentioned it to me earlier that day. There is a transformer cage inside, next to the ice plant, and he was in there painting the leads to the transformer with red lead or some kind of red paint and I spoke to him, just general conversation, and then I went up to the platform, that is where I spent most of my time. That is all I knew about him working with electricity, I meant that he was painting the leads.

Q. He was just painting?                      A. Yes, sir.

Q. Now, Mr. McClellan, to your knowledge what is the fact as to whether or not there was work going on on the electrical [159] equipment at the plant or around the plant throughout that day?

A. Yes, sir, I saw the lid of the transformers off, that is, the top plate off, but I didn't see anybody in there, I meant there was the person that I referred to in there but he was the one that I remembered that was introduced as the Union Pacific electrician, he and Mr. Johnson was gone at the time that I was past the office talking to LaVerl Johnson, they were over at the P.F.E. car shops, I think, at that time and that is approximately a quarter or a half mile from the ice plant.



(Testimony of Guy McClellan.)

Q. To your knowledge, Mr. McClellan, when this accident occurred there that afternoon, do you know whether the Union Pacific was called?

A. I don't remember whether I called them or not, I called about everybody that I could think of.

Mr. Racine: That is all.

### Cross Examination

Q. (By Mr. Anderson): You wouldn't say definitely that you called anybody in the railroad company that day, would you?

A. Where I was at, in the office, there are no numbers posted and I just grabbed the telephone book and I started to call the police, the fire department and the ambulance.

Q. That was your interest at that time, wasn't it? [160] A. Yes.

Q. That is, to get help for LaVerl?

A. Yes, if possible.

Q. And you would not say that you called anybody at the railroad?

A. Well, I can't remember whether I did or not, sir.

Q. In the early part of your testimony you stated that the Union Pacific Railroad was generally called about electrical work. I suppose that they also called the Idaho Power Company, don't they? A. Not to my knowledge, I never did.

Q. Did you ever call any Union Pacific electrician yourself?

A. I have called the powerhouse twice, I be-

(Testimony of Guy McClellan.)

lieve, in the three or four or five years that I have been out there.

Q. And what was that for?

A. One night we had a bad storm and the power went off, I work mostly at night.

Q. That was probably some fuse on the power line?

Mr. Racine: We object to this, if the witness knows, he can say, but we object to this as not a fair and proper question.

The Court: The objection is sustained. He can tell what he knows about it.

A. I don't know anything about electricity.

Q. You don't know what caused the power to go out? [161]

A. No, sir, it could be running into the ground or up in the sky and I would not know the difference.

Q. Now, this Union Pacific electrician you mentioned, who introduced you to him, was it H. O. Johnson?      A. Yes, sir.

Q. How did he introduce him to you?

A. Well, it was rather peculiar, he told me this fellow's name and I don't know but it seems that people's faces and forms stick in my memory more than anything else and I remember this fellow looked more like a farmer than a electrician and, I said, "Good Lord, that man is not an electrician, is he?" And he said, "Yes, he is a U.P. electrician." That is all that I know about whether it was a U. P. man or anything else. \* \* \* \* \*

(Testimony of Guy McClellan.)

Q. Pardon me, Mr. McClellan, do you remember being up in my office about ten days ago when Mr. Shoup and you and I were there, do you recall that occasion?

A. Yes, sir.

Q. And isn't it a fact that you stated to us that if you were put under oath you could not——

The Court: Mr. Anderson, I have had this same matter up quite often and I just want to caution you that if you ask him a question concerning a matter in [162] your presence for the purpose of impeachment then of necessity you might be required to take the witness stand and you would not be permitted to proceed with this case, I have had that up so much about conversations between attorneys and witnesses,—however, you may go right ahead, I don't want to stop you but I thought I better call the matter to your attention. [163]

\* \* \* \* \*

Q. The only reason that you say that this man was a Union Pacific electrician was because Mr. Johnson introduced you to him as such?

A. At the time that I met this man,——

Q. Will you please answer the question?

A. May I answer it in my own way?

Q. Well, isn't it a fact that the only reason you say that he was a Union Pacific electrician was because Mr. H. O. Johnson introduced you to him as such, isn't that right?

A. Basically, yes, sir.

Q. So that you don't know except for that, that he was a Union Pacific electrician?

(Testimony of Guy McClellan.)

A. No, sir.

The Court: Now, you may explain your answer if you desire.

A. Well, like I say, I asked Mr. Johnson if he was an electrician because of his appearance. He told me that he was a Union Pacific electrician.

Q. How did it interest you to know that he was an electrician, is that because Mr. Johnson said that he was an electrician?     A. Yes.

Q. Do you know how that happened to be brought into the conversation that he was a Union Pacific electrician?

A. Well, I was kidding Mr. Johnson about the man's appearance and being an electrician. [164]

Q. He looked like a farmer to you and you did not think he was an electrician?

A. That is right.

Q. Mr. H. O. Johnson who introduced him to you is now deceased?     A. Yes.

Q. He died very suddenly?     A. Yes, sir.

Q. You mentioned the fact that you had some discussion with LaVerl Johnson that morning about the work that he was doing?

A. I didn't say that, sir.

Q. What was it that you said about that, you said something about the work he was doing in the small transformer cage in the ice plant?

A. He was painting the leads when I stopped to talk to him,—just common ordinary talk.

Q. He was painting the leads in the small transformer cage in the ice plant?     A. Yes, sir.

(Testimony of Guy McClellan.)

Q. You saw him doing that? A. Yes.

Q. And those were wires that were taped up and came either in or out of the transformer?

A. Yes.

Q. Did he tell you what he was going to do over in the big [165] transformer cage where he was injured? A. I don't recall that.

Q. You don't know whether he told you or not?

A. I don't recall that; hardly anything was mentioned about his work.

Q. Where LaVerl was injured, in the transformer cage, he was not injured at a transformer?

A. They told me it was at the lightning arrester.

Q. At the lightning arrester?

A. Yes, whatever you call it.

Q. Those were back of the transformers, to the east about 10 or 15 feet? A. About that.

Q. As you come in the gate of the transformer cage, there were three transformers in front of the gate?

A. I think there are three there, yes.

Q. And the lightning arresters at the back?

A. Yes.

Q. Did you happen to observe any foot prints of Mr. Johnson's from the gate around to the lightning arresters?

A. Yes, there was quite a discussion about the foot prints and what did take place.

Q. Did you see them? A. Yes.

Q. After he entered the gate, he turned to the left and went [166] around the transformer, that

(Testimony of Guy McClellan.)

is the north transformer, and then switched back and then to the east lightning arrester and then south to the south lightning arrester?

A. Yes, sir.

Q. Those lightning arresters, they don't look anything like transformers, do they?

A. No, not like the ones in front.

Mr. Anderson: I think that is all.

Mr. Racine: That is all, thank you, Mr. McClellan.

MILTON T. SARGENT

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is Milton T. Sargent?     A. Yes, sir.

Q. And you reside in Pocatello?

A. Yes, sir.

Q. By whom are you employed?

A. The Idaho Power Company.

Q. What is your position?

A. I am division chief clerk.

Q. As such, in that position, do you have the responsibility for the records regarding the charges to the customers of [167] various types, showing the amounts of electricity furnished?

A. Yes, sir.

Q. Do you have under your control and supervision the records as to the year 1950?

A. Yes, sir, I do.

(Testimony of Milton T. Sargent.)

Q. And do you have such records with respect to the electricity furnished to the Union Pacific Railroad Company by the Idaho Power Company?

A. I do.

Q. Do you have such records with you in court?

A. I do.

Q. What period of time do those records cover?

A. From the 20th of December, 1949, that is, approximately the 20th of December of 1949 to the 20th of November, 1950.

Q. Now, do you have any records under your control or supervision with respect to the power furnished to Pacific Fruit Express Company in Pocatello?      A. I do not.

Q. As a matter of fact, do you know whether the Idaho Power Company furnished power directly to the Pacific Fruit Express Company and bills them for it?

A. There is no billing. I cannot say whether we furnish power or not. There is a possibility that we don't furnish all of it. I am not at all familiar with the electrical end and I cannot tell you. [168]

Q. But there is no charge to the Pacific Fruit Express Company?

A. No, there is no charge in our records, that is right.

Q. Do you have all of those records with you?

A. Yes, I believe I have everything that you requested, I think they are all included in this (indicating).

Q. Mr. Sargent, you have been handed Exhibit

(Testimony of Milton T. Sargent.)

No. 18, marked for identification, you are familiar with what the exhibit represents?

A. Yes, sir.

Q. Does that include the billings that you have testified to?     A. Yes, that is right.

Mr. Racine: We would like to offer Exhibit No. 18 in evidence at this time.

Mr. Anderson: We object to Exhibit No. 18, if the Court please, this relates to electrical energy furnished to the Union Pacific Railroad Company by the Idaho Power Company. It has no connection with this case, it is charged that the Union Pacific Railroad Company furnished the electrical energy.

The Court: It may be admitted.

Mr. Racine: That is all. You may cross examine.

### Cross Examination

Q. (By Mr. Anderson): There might be some power furnished to the Pacific Fruit Express Company that you are not aware of?

A. I think there is a possibility that there is power furnished to the Pacific Fruit Express Company,—not direct but indirectly it comes from the Idaho Power Company.

Mr. Anderson: That is all.

Mr. Racine: That is all, thank you, Mr. Sargent.



DR. DAVID JOHN NELSON

called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Racine

Mr. Racine: If the Court please, this may be a little out of order but the doctor was available at this time.

The Court: That is quite all right, we try to make it as convenient as possible for these doctors, realizing they are busy.

Q. Your full name, Dr. Nelson?

A. David John Nelson.

Q. Where do you reside? [170]

A. Pocatello.

Q. Are you acquainted,—strike that, please,—are you admitted to practice your profession, the profession of medicine in the State of Idaho?

A. Yes.

Mr. Anderson: We will admit the doctor's qualifications.

The Court: The qualifications of Doctor Nelson are admitted.

Mr. Racine: And you will admit, Mr. Anderson, that he is an orthopedic specialist?

Mr. Anderson: Yes, we will.

Q. Are you familiar with LaVerl Johnson?

A. Yes, sir.

Q. When did you first become acquainted with LaVerl Johnson?

A. I first saw him on the second of May, 1951.

(Testimony of Dr. David John Nelson.)

Q. And what were the circumstances?

A. I was called to the old General Hospital by Dr. Hughart to act as consultant for Dr. Hughart in this case and to examine the patient and carry out what treatment seemed necessary.

Q. And the nature of Mr. Johnson's wounds were in accordance with your practice, your specialty?

A. Yes, they were.

Q. What was Mr. Johnson's condition when you first saw him,— [171] when you first observed him in your professional relationship?

A. When I first saw him on May 2, 1951, I found that he had already,—before my first visit, that he had three amputations, both legs approximately six inches below the knee had been amputated, the right arm had been amputated approximately three inches below the shoulder joint. These were guillotine type of amputations—

Mr. Casterlin: Now, we object to this as being demonstrative and prejudicial, I think that the nature of the previous operations or amputations are entirely immaterial in their detail, because this is not a suit for malpractice.

The Court: The objection is overruled.

Q. Just proceed, Doctor.

A. The reason that I mentioned that the amputations were of a guillotine type is because due to the type of injury, trauma which the patient suffered, it was necessary to get rid of gangrenous tissue and no attempt could be made at that time to give him a definitive operation or a complete

(Testimony of Dr. David John Nelson.)

amputation, the guillotine was done. This does not leave a stump or an amputated extremity which is suitable to be fitted with an artificial limb, although the previous surgery, to my opinion, had been just the right thing to do and was successful; the patient required further surgery now that the danger [172] of infection had passed. I so stated on his hospital record that what we call a revision of the amputation stumps was then in order.

Q. What was then done, Doctor?

A. Dr. Hughart requested that I take the patient over as my own and proceed with what I felt was necessary. The next day, May 3, 1951, I took the patient to the operating room and began by taking care of the left stump first, the amputated stump of the left leg. The scar tissue was removed and about three-fourths inch of bone was removed from the tibia, the main leg bone, and about two inches from the smaller leg bone, called the fibula, was also removed. In doing so this allowed healthy skin and fat of the upper part of the stump to be brought together over the end of the stump and thereby giving a good covering to the end of the stump. Also, at that time an ulcer on the stump of the right leg was cleaned out and some bone removed from that.

Q. Doctor, what do you mean by an ulcer?

A. An ulcer in this case was where an area of skin and underlying tissue, approximately an inch and a half by three inches was missing from the side of the stump just below the knee on the right

(Testimony of Dr. David John Nelson.)

and the bone was bare and exposed to the air. So it was necessary to get this bone covered by skin, so this entire area which contained some fragments [173] of dead tissue and bone was thoroughly cleaned out and in that way was prepared for a skin graft, which I felt at that time and which subsequently turned out to be true. Then I gave a skin graft, I felt that I could skin graft, by laying new skin over that area in about a week and close it up and allow it to heal. That was the first operation.

Q. That was in May?

A. That was on May 3rd.

Q. What is the fact, Doctor, as to whether or not such operation or treatment which you gave on May 3 was or was not painful to the patient?

A. Yes, it was painful.

Q. How long, if you know, Doctor, was Mr. Johnson in the hospital on that occasion?

A. I discharged the patient on May 26, 1951. The operation had healed well,—I would have to consult the hospital records to find the date but sometime between the first operation on May 3 and May 26th an operation was done on the stump of the right arm, I don't have the exact date on my records but I do have it on the hospital records.

Q. It is on the hospital records?     A. Yes.

Q. Aside from the exact date, do you recall the nature of the operation on the stump of the right arm? [174]

A. Yes, that was essentially the same as done on

(Testimony of Dr. David John Nelson.)

the left leg, we removed scar tissue and removed a part of a nerve which was caught in the scar tissue and also removed some bone and covered the area with skin which was present there. In other words, it was a revision of that stump.

Q. Doctor, would that be painful?

A. Yes, that was also painful.

Q. When did you next see Mr. Johnson following his discharge from the hospital the latter part of May, 1951?

A. I next saw him,—well, I saw him every few days actually. Either I saw him or Dr. Hughart saw him and sometimes both of us together, I didn't keep track of all of the dates, but it was a matter of removing the stitches, changing dressings, and waiting for him to improve in strength until further surgery could be done.

Q. Subsequent to the first operation, until the later operation you would see him frequently, I take it?

A. Yes, sir.

Q. When was the next operation accomplished?

A. Well, all three of these operations,—I should say all four of them, although some of them were combined, they were all done in the hospital there at the one hospitalization, so that when he was discharged May 26th, 1951, all of the surgery had been done.

Q. Wasn't there later surgery, in July of 1951?

A. I don't recall.

Q. Will you observe these hospital records to refresh your recollection?

(Testimony of Dr. David John Nelson.)

Mr. Casterlin: He is being offered the hospital records for that purpose only?

Mr. Racine: Yes, for that purpose only.

A. Yes, I was mistaken on my notes or records, —the revision of the right stump was done on July 21, 1951, in the same manner as I described for the left leg.

Q. I think you testified that was painful?

A. Yes.

Q. You thought that you did that in May?

A. Yes, I was wrong on that.

Q. Now, Doctor, what was the nature of the anesthetic used to accomplish this operation or rather these operations?

A. Will you repeat that please?

Q. Yes, the anesthetic, was it a general or local?

A. It would be a general anesthetic.

Mr. Casterlin: We object to that as immaterial, he has testified to the essential facts that he had the operations, that they were painful, and I think now the extent of the anesthesia is unimportant.

The Court: I think the whole matter should come in, it should go to the jury, I am sure. I will allow him to answer. [176]

A. It was a general anesthetic for all of the operations.

Q. Now, Doctor, following the July operation, when did you next see Mr. Johnson, if you now recall?

A. I next saw him on August 1, 1951.

Q. What was that occasion?

(Testimony of Dr. David John Nelson.)

A. That was to remove the stitches and change the dressing and to examine the wounds.

Q. If you would, Doctor, just to get along a little faster, go through right from then on, the various occasions that you did observe Mr. Johnson, when you did see him and undertake any operations further?

A. On August 23, 1951, I saw him again, at which time I made some plaster models which are patterns of the stumps so they could be sent to the Chester-Bray Shop in Boise for making artificial limbs. Then again on September 10, 1951, I saw him and arranged for the patient to go to Boise to have made and fitted these artificial limbs. He stayed in Boise at the Elks Convalescent Home to be shown how to use them, however, after about a week he developed a blister,—I don't remember which stump but he did develop the blister which necessitated his leaving the stump off for a time so the came back home. Not having had the usual length of time to learn to use these artificial limbs, he came back home until this blister healed and then began using them again. I saw him in October of 1951 and he was beginning to walk [177] fairly well, he was using the artificial legs and a cane. He was not able to walk very far. He was getting some chafing from the artificial limbs but seemed to be doing as well as could be expected for that length of time. My next note is on January 9, 1952, he came in because both stumps were somewhat irritated from walking. He was shown how to treat these with Lanolin oint-

(Testimony of Dr. David John Nelson.)

ment. On March 4, 1952, I saw him because of what we call cellulitis, which is a low grade infection of the skin at the end of the left stump. I gave him Penicillin and advised him not to use the limb for at least a week and to use hot soaks and this cleared up. I saw him again on April 28, 1952; he had a crack in the skin of the left stump and this was treated and healed. I saw him in June, it was June 30, 1952, and the patient at that time was having some irritation where the weight comes on the stump,—the left stump. At that time I advised that the artificial limb have an extra attachment put on top to bear some of the weight on the hip bone instead of all of it being borne on the stump. He was subsequently fitted with such a piece. He had very little trouble after that until I saw him again on October 20, 1953, at which time the artificial limb didn't seem to fit quite so well. I advised that the ischio ring, or the part that bears the weight on the hip be raised up and that has been done. That was the last time that I [178] have seen him as a doctor, that was on October 20, 1953.

Q. Now, Doctor,—

A. —Just a minute, if I may retract that statement. I did see him on Saturday, this past Saturday, but since I had these records at home I do not have a note on the chart, but I did see him this past Saturday and found him having some irritation of the right stump from his prosthesis or artificial limb, in the area where this skin graft had been done originally.



(Testimony of Dr. David John Nelson.)

Q. Now, Doctor, from your most recent examination of LaVerl Johnson and from your general treatment of him, what is your prognosis or what is your opinion as to what further operations may be necessary?

A. The only possibility as to further surgery, as I see it at the present time, is that this area that was skin grafted may have to be treated further in that at the time, a thin piece of skin was the only skin that would take or grow and that may need to be removed and further revision done at that point. Possibly with the removal of a little more bone.

Q. And will that require an anesthetic?

A. Yes.

Q. And will it be painful?

A. Somewhat, yes.

Q. What is your opinion, Doctor, your medical opinion as to the use of the limbs of LaVerl Johnson, the artificial limbs and [179] the treatment necessary, the treatment and difficulties that he may experience in future life as he grows older, that is, regarding the use of the artificial limbs?

A. As regards the artificial arm, because of the very short stump, practically no stump of the right upper arm remains, that type of artificial arm is not very useful. In fact, it is very frequently discarded as being more in the way than of any value since there is no way in which they can activate or motivate it. They cannot move it themselves so I don't think that the right arm prosthesis,—although he was fitted with as good a one as can be obtained,—

(Testimony of Dr. David John Nelson.)

they are not too satisfactory. As to the artificial legs, I believe that every amputee experiences the same thing as I have mentioned in these notes, they get irritation, little fissures in the skin, blisters, sometimes infected hairs and they all have to leave their limbs off several days at a time, perhaps two or three times a year. It varies with different individuals, but they can never wear them constantly and continuously because of the irritation on the skin.

Q. Doctor, do you know of your own knowledge whether Mr. Johnson can attach these limbs without assistance, without any help, and take care of himself in that way?

A. Yes, he has done that in my office—that is the legs,—I have not seen him take the arm part off and on. [180]

Q. You don't know about that?                    A. No.

Q. Do you know approximately the expense of those limbs?

Mr. Casterlin: We object to this as not being within the four corners of the complaint and in this connection I suggest a conference with your Honor before any ruling is made on this matter, I suggest that conference in the absence of the jury.

The Court: In case, after a conference the Court holds that it is competent would it be necessary to call this doctor again or would you stipulate as to that?

Mr. Casterlin: I think if we could have three or four minutes that we can finish this right up.

(Testimony of Dr. David John Nelson.)

The Court: I want to finish with the examination of this doctor before noon because I know they are busy and I don't want to call him back this afternoon if we can avoid it.

Mr. Casterlin: I think the cross examination will be very short.

The Court: The jury may retire for a few moments.

Mr. Casterlin: Generally, the point is, that the man is receiving compensation from the Industrial Accident Board and the terms of the Board are that he shall [181] be furnished this medical attention so that he is without personal expense and the amount of it is immaterial.

The Court: The only trouble with that, Mr. Casterlin, is that at the end of this trial in case that there was a verdict in favor of the plaintiff, they are going to take all of that money away from him.

Mr. Casterlin: That is true, I wonder if I may ask the Court for permission for Mr. Anderson to explain this matter. He is more familiar with the operation of the Industrial Accident Board.

The Court: Yes, he may go ahead with his explanation.

Mr. Anderson: As to the artificial limbs and even the hospital and medical expense, that is provided for by the Union Pacific Railroad Company Employees' Hospital Association, which is a separate corporation providing service for employees who belong to that association and pay dues, and the

(Testimony of Dr. David John Nelson.)

artificial limbs, the original ones at least, are paid for by that association in accordance with the dues paid into the association. I think that is correct, isn't it, Doctor, you can answer that?

A. That is correct.

Mr. Racine: Probably that is correct and what we are getting at is that this man is a young man and he has many years in which to live. If he is going to have [182] to buy these legs from time to time and they run into a substantial sum of money then certainly it should be a part of his general damages. Our client informs us that he has been informed that they will buy but one set of legs.

The Court: You can ask him about the future, not what has already been furnished. Mr. Bailiff, recall the jury.

Mr. Racine: Will you strike that previous question, Mr. Reporter, and I will ask this.

Q. Doctor, is it probable that through Mr. Johnson's lifetime he will be required to replace the limbs which he has been fitted with, as he goes along?      A. Yes.

Q. Do you have any thought or estimate as to how frequently that may occur?

A. It varies a great deal as to a person's occupation and how much he uses the limb,—how much he walks around. Naturally a man in heavy labor will wear out a limb faster than one in a more sedentary type of occupation. I could only give a rough estimate and that is that an artificial limb usually lasts five to seven years, that is the legs.

(Testimony of Dr. David John Nelson.)

Q. You say those are the legs you are speaking of? A. Yes.

Q. Do you have any information as to the cost of such limbs?

A. The cost of the artificial arm, I can give that exactly, [183] the total cost was \$462.00. That includes a cosmetic hand which is rarely worn and that cost \$40.00, and that would practically never wear out, so it would be approximately \$422.00 for that part that they use. The artificial legs would run about \$300.00 each.

Q. Do the limbs require repair and upkeep from time to time? A. Yes.

Q. Do you have any knowledge as to the probable cost of that?

A. That varies a great deal, depending upon what wears out.

Q. But there is a cost in that connection and repairs are necessary? A. Yes, sir.

Q. Now, Doctor, what is the fact as to your medical knowledge with regard to whether or not LaVerl suffers and is in pain in the use of those limbs, would you know as to that?

A. I wouldn't say there was very much suffering now.

Q. Would it be painful to walk on the limbs, particularly if they chafe or if there is irritation?

A. Only at times.

Q. When there is irritation? A. Yes.

Mr. Racine: You may inquire.

(Testimony of Dr. David John Nelson.)

Cross Examination

Q. (By Mr. Casterlin): Doctor Nelson, as you view the patient now, what have you to [184] say as to the probability of irritation from the use of the artificial limbs in the future?

A. We can almost guarantee that he will have at least one week a year where he cannot wear them.

Q. Doctor, you have mentioned renewal with respect to the limbs; what have you to say about renewal with respect to the arm?

A. Well, since they hardly ever use them, that is, very much, it would last a great deal longer than the artificial legs. They do get out of order more easily than the legs, in that they have more moving parts and they are made of lighter construction and they tend to break easier. However, that is more repair rather than a matter of replacement.

Q. You mentioned revision of the left leg. I am not certain as to when that took place, as to whether it took place between May 3rd and 26th or later?

A. The revision of the left leg was first; that was done May 3rd.

Q. And the revision of the right leg?

A. The revision of the right leg was on July 21, 1951.

Q. The arm and the left leg then was between May 3rd and May 26th? A. Yes, sir.

Q. You mentioned the means or the manner of the amputation of the limbs in the first instance.

(Testimony of Dr. David John Nelson.)

Would you say that was the proper method to use in this case? [185]      A. Yes, sir.

Q. Prior to the time that you got the case, you find nothing in connection with this treatment that was improper?

A. No, I think the treatment up to the time that I saw him was exactly right.

Q. As to your treatment, did he progress normally, about as the usual amputee would have progressed?

A. Yes, or perhaps a little better.

Q. I think that you stated your prognosis as to his condition, that is, as to what his condition would be in the future?

A. I think he will remain essentially as he is with occasional days where he cannot wear the limbs. Possibly with this one operation necessary if the skin which was placed there does not hold up, if it is not tough enough to stand the irritation from the limb.

Q. With those exceptions he will progress well or remain as he is?

A. As he is now, yes.

Mr. Casterlin: That is all.

### Redirect Examination

Q. (By Mr. Racine): Doctor Nelson, has LaVerl Johnson been cooperative at all times, would you answer?      A. Yes, very.

Mr. Racine: That is all, Doctor. [186]

The Court: It is so near noon now I am going

to recess because we are going to take up early after lunch. I will now adjourn until 1:15 this afternoon.

November 23, 1953, 1:15 o'clock p.m.

EARL R. GILBERT

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is Earl R. Gilbert?     A. Yes, sir.

Q. Where do you reside, Mr. Gilbert?

A. 934, West Center, Pocatello.

Q. Have you ever been a witness before?

A. Not in Federal Court.

Q. Well, you just speak up so that the Court and jury can hear and address your remarks to the jury.     A. Yes.

Q. You live here in Pocatello?     A. I do.

Q. And what is your work?

A. I am district foreman for the Idaho Power Company.

Q. What was your work on November 4, 1950?

A. I was district foreman of the Idaho Power Company at that time.

Q. What does that work involve?

A. I am in charge of the construction and maintenance and service in Pocatello area.

Q. In the Pocatello area?     A. Yes, sir.



(Testimony of Earl R. Gilbert.)

Q. For how many years have you held that position? A. 24 years.

Q. For how many years have you been involved and engaged in electrical construction and maintenance work or business?

A. The whole time would be 37 years.

Q. On November 4, 1950, and prior to that time, if you know, from whom did the Pacific Fruit Express Company in Pocatello obtain its electricity?

A. It is tapped off the Union Pacific Batiste line.

Q. Who is that line controlled by?

A. It is controlled by the Union Pacific Railroad Company.

Q. You know that, do you? A. Yes, sir.

Q. Before we go into the exhibits which you have in your hand, Mr. Gilbert, will you state if you know of your own knowledge on November 4, 1950, and prior to that time who did the work on the electrical apparatus and that type of equipment at the Pacific Fruit Express Company plant? [188]

A. The Idaho Power Company did not do it. I cannot say who did all of their work but on two different times electricians from the shops have been there when I have been called.

Q. From what shops?

A. From the Union Pacific shop under Irv Eskelsen.

Q. You stated that the Idaho Power Company did not do that work? A. That is right.

Q. You have in your hand Exhibits No. 14, 16

(Testimony of Earl R. Gilbert.)

and 17, I will ask you if you recognize what is shown by those exhibits?      A. I do.

Q. What is it?

A. This is the sub-station yard at the Pacific Fruit Express ice plant located south of King Street on Harrison Street.

Q. Just south of the plant itself?

A. Yes, sir.

Q. Did you have occasion on November 4, 1950, to go to that sub-station?      A. I did.

Q. Would you state when and under what circumstances?

A. If I may digress, I was at a football game when the call came in that a man was injured at the P.F.E. plant. As quick as I got in my car I got a radio contact and went immediately out there.

Q. What did you observe there?

A. The east fence was raised up, the pole top switch was open [189] but the disconnect switches on the lightning arresters was not open. In other words it was hot to the lightning arrestors and the lightning arresters set about three and a half feet above the ground which made the 12.5 hot contacts this close to the ground running into the lightning arresters.

Q. What do you mean by 12.5?

A. The voltage between phases on that line.

Q. Does that mean twelve thousand five hundred volts?

A. Twelve thousand five hundred volts, that is what it is. It is classified as a 12-5 line.

(Testimony of Earl R. Gilbert.)

Q. Is that the amount of voltage going into the sub-station?

A. The amount between phases into the sub-station?

Q. As I understand you, when you arrived there the pole-top switch was open?

A. That is right.

Q. Will you explain to the Court and jury what you mean by pole-top switch?

A. The pole-top switch is a disconnecting switch that breaks a load between the line and the transformers, or it could break between two lines. In other words, it can kill a certain section of line. This here (indicating) definitely opened to kill the transformers at the Pacific Fruit Express yard.

Q. In being so open what was the fact as to the lightning arresters? [190]

A. They were still hot.

Q. And by being still hot what do you mean with respect to the voltage?

A. They are energized with 12.5 volts.

Q. Where was Mr. Johnson at that time?

A. Mr. Johnson,—well, I don't know whether it was Mr. Johnson or Mr. Shoup that I contacted at that time, or it could have been Mr. McClellan.

Q. Where was Mr. LaVerl Johnson?

A. He was in the hospital, I could see definitely where he had been against the hot wires.

Q. Will you describe what you mean by lightning arresters?

A. Lightning arrester is an instrument,—

(Testimony of Earl R. Gilbert.)

Mr. Racine: —First, I want to offer now Plaintiffs' Exhibit No. 20 which is an enlargement of Plaintiffs' Exhibit, an enlargement of either 14, 16 or 17, one of them.

Mr. Anderson: We have no objection to that.

The Court: It may be admitted. What was the number of that exhibit?

The Clerk: This is Exhibit 20. No. 19 was marked but it was not offered.

Mr. Racine: May the witness step down to this exhibit? [191]

The Court: Yes, he may do so.

Q. Now, Mr. Gilbert, will you step down here and point on the exhibit, for the benefit of the Court and jury, point out what is shown on the exhibit and what you know to be a lightning arrester?

A. Yes, and I can explain what a pole-top switch is. This is the pole-top switch located here (indicating). This is a rod for it and by turning a handle here (indicating) it breaks, it breaks that circuit, that wire that goes around here and feeds the transformer. These big things right here (indicating) are the transformers,—can you notice the difference, there are three,—no, there are four lightning arresters, there is one over here, one here, one here and one here (indicating). This lead as you can notice, the wire that comes off there and down here and contacts the top of this disconnect. That disconnect is closed. It comes down and feeds to these arresters. You will notice on this

(Testimony of Earl R. Gilbert.)

side is your fuse disconnect, where you fuse the transformer. With this switch open this is completely dead on the west side of the tower but three phases come down here (indicating) this low to the ground and feed into this arrester. One arrester is grounded and the other three hot phases come to this. This is an older type of arrester and is called the dry type, it doesn't need to be energized,—let me explain—— [192]

Mr. Anderson: If the Court please, I think the witness has now gone beyond the question, I think he has fully answered.

The Court: I think you are right, however, it might save time if he was permitted to go ahead.

Mr. Racine: I will ask another question.

Q. Just explain the various electrical equipment as shown by the exhibit as you knew the equipment on November 4, 1950?

Mr. Anderson: It seems to us, your Honor, that he has already done that.

Q. To the extent that you have not explained it, Mr. Gilbert, as it existed there on November 4th, and shown by the exhibit, will you explain to the Court and the jury the electrical equipment shown and which existed at that sub-station on November 4, 1950?

A. We are not interested in the load side of that any more. Here is the line side connected ahead of the switch and leads down through the three disconnects to the lightning arresters. When the switch was open this line was still hot to the light-

(Testimony of Earl R. Gilbert.)

ning arresters because these three disconnects were not open.

Mr. Racine: You may inquire. [193]

### Cross Examination

Q. (By Mr. Anderson): Mr. Gilbert, how long is that line that goes from the sub-station across the track to the Batiste line?     A. Two spans.

Q. How many feet would you say?

A. I don't think it could be over 250 feet,—they are short spans,—there is one pole between that and the junction and this tower.

Q. The only purpose it serves is to serve this sub-station at the Pacific Fruit Express?

A. Yes, there is no other tap off it.

Q. Now, Mr. Gilbert, about what time of the day do you think that you got out there after the football game?     A. It was around 4:30.

Q. Do you know when the accident occurred?

A. Around 2:00, they said somewhere around 2:00 o'clock.

Q. Did you observe in the sub-station there any footprints of Mr. Johnson's?

A. I did, sir.

Q. Can you describe them, please, the course that they took?

A. Could I show it on the map, maybe I could show it better on this.

Q. Now, just a minute, first, let me ask this, the sub-station there is completely enclosed with a high fence? [194]     A. That is right.

(Testimony of Earl R. Gilbert.)

Q. And the gate is in what we term the west side?  
A. That is right.

Q. And as you enter the west gate, that is the only gate, isn't it?

A. That is the only entrance.

Q. Do you know whether that is kept locked?

A. It has been locked every time that I have been there.

Q. As you go in this gate, what is right immediately in front of you?

A. The three transformers immediately in front.

Q. To the left, in the northwest corner what is there?

A. The metering equipment for the 2300 volt,—this sub-station metered on the 2300 side or the secondary side of the transformers.

Q. That is customary, is it?

A. Yes, it could be both ways.

Q. But it is customary in instances of that sort?

A. Which ever is better, we meter both ways.

Q. Is there another switch near that meter, some sort that comes in by taped wires fom the transformers?  
A. I don't recall.

Q. As Mr. Johnson entered this gate, could you trace his foot prints for us as he turned to the left?

A. To his left? [195]

Q. Yes, and went around the meter box?

A. Between the meter box and the fence his prints were very plain, a man could see exactly his steps, I don't know if there was snow or not but you could see the footprints.

(Testimony of Earl R. Gilbert.)

Q. So he came clear around to the east of the transformer?

A. Clear to the east and on the neutral arrester he walked into it and back, he came to the south and that is where he touched the wire, on the south.

Q. You can only tell what happened from the footprints?

A. That's right, and they were messed up where he went on to the ground.

Q. Did the tracks indicate that he stopped anywhere except this neutral or ground wire?

A. They were straight to the ground and back on to the south side.

Q. Have you been out there quite a lot, out around there?

A. Several times, yes, that's right.

Q. I guess you know who operates that substation?

A. Mr. Shoup or Mr. Johnson generally contacted me. I have been out on two or three cases of trouble they have had there, transformer fuse blown out and once the transformer burned up and Mr. Shoup called me, Mr. Shoup or Mr. Johnson generally.

Q. Mr. Shoup of the Pacific Fruit Express, you mean?      A. That's right. [196]

Q. And also Mr. Johnson of the Pacific Fruit Express?

A. Yes, the Mr. Johnson that died.

Q. Mr. H. O. Johnson?      A. Yes.

Q. And how did they let you in?



(Testimony of Earl R. Gilbert.)

A. They always let me in at the gate, unlocked the gate.

Q. To let you in the gate? A. Yes.

Q. And they had the key?

A. That's right.

Q. You understand that the Pacific Fruit Express Company operates the sub-station?

Mr. Racine: We object to what he understands, especially by reason of what he has testified.

The Court: If he knows he may answer.

A. I know that they have the key, I don't know who operates it.

Q. Anytime that you have been there, you have been there at the request of Mr. Shoup or Mr. Johnson of the Pacific Fruit Express Company?

A. That is right.

Q. Did you ever see any Union Pacific men over there operating or in charge of that sub-station?

A. I noticed a Union Pacific electrician there repairing that sub-station.

Q. Do you know when that was, about? [197]

A. It happened about early in the spring after this accident.

Q. Afterwards?

A. Yes, one of the transformers burned up, that is why Mr. Shoup or Mr. Johnson, I don't recall which,—they were having trouble in the single phasing, this three phase motor would not start and they called me. I noticed the fuse out and I re-fused it but it wouldn't hold and so we

(Testimony of Earl R. Gilbert.)

disconnected,—we killed the switch, disconnected the transformer and tested each one individually to see which one was bad and that is as far as I went with them.

Q. These disconnect switches that you refer to that are above the lightning arresters, if whoever sent LaVerl Johnson in there to work that day had pulled those switches, then the lightning arresters would have been de-energized, would they not?

Mr. Racine: Now, we object to the form of that question as it is because it is assuming that whoever sent LaVerl Johnson in did pull those switches and there is no evidence to that effect, there is no fact in the record to base that on.

The Court: Well, the fact is they were not pulled and there is no inference as to who did it. You may proceed.

Q. Those disconnect switches could have been pulled, couldn't they? [198]

A. That is right, they could have been pulled.

Q. And that would have de-energized that lightning arrester?     A. Yes, that's right.

Q. Mr. Gilbert, can you tell me about how far it is from the transformers themselves back to the concrete base that the lightning arresters are on?

A. Well, just to judge that I would say about 12 feet. That is about a 30 foot square, the transformer yard, and I am just guessing at that. I have never measured that but it is my thought on it.

Q. This transformer sets over to the west,—the

(Testimony of Earl R. Gilbert.)

southwest of the railroad tracks that serve the P.F.E. ice docks, does it not?

A. The one outside of the engine room?

Q. Yes, where Mr. Johnson was injured?

A. Will you please state that question again?

Q. The sub-station sets to the west of the railroad tracks and the ice-dock?

A. To the west, that is right, and south of the Pacific Fruit Express ice plant.

Q. Except for the enclosure right around the sub-station, the rest of the area is open to the Pacific Fruit Express plant and over to the railroad tracks?

A. Just the one pole into the north that you see that interferes with any space there. [199]

Q. And then there is an open space for trucks and automobiles to park? A. Yes.

Mr. Anderson: That is all.

#### Redirect Examination

Q. (By Mr. Racine): Mr. Gilbert, on the occasions that you were called to the ice plant, if there was any trouble who did the work?

A. Generally the electricians from the railroad company.

Q. When you were there November 4, 1950, did you observe any hot-sticks? A. No.

Q. Will you explain what a hot-stick is, for the benefit of the Court and jury?

A. A hot-stick is a treated piece of laminated wood with a special type of shellac to waterproof

(Testimony of Earl R. Gilbert.)

it and is a non-conductor,—on the head, or on the top or one end of the stick, and it can be six or twelve or eighteen feet long, it has a head on it with a finger that sets out to the side, the finger is what they pull that disconnects or use to fuse the transformer with.

Q. You use the hot-stick to pull the disconnect switch, is that right?      A. That is right.

Q. Had you ever observed or noticed a hot-stick out at that [200] sub-station?

A. I never had.

Q. Is that customary equipment for such a place, a hot-stick?

A. In our sub-stations we have hot-sticks.

Mr. Racine: That is all.

#### Recross Examination

Q. (By Mr. Anderson): You would not say that the Pacific Fruit Express did not have them?

A. I wouldn't say, I didn't see any.

Q. But you would not say that the Pacific Fruit Express did not have a hot-stick available?

A. I know that I had to pull them one time and they didn't have one then. I never did see one there, I had to pull the disconnect when they were making some change on the transformer.

Q. They might have had one over in the ice plant?

A. They might have, but I never did see it.

Mr. Anderson: That is all.

Mr. Racine: Nothing further. [201]

HAROLD W. RISING

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is Harold Rising? A. Harold W. Rising.

Q. Where do you live, sir?

A. At Idaho Falls.

Q. What is your occupation?

A. I am manager of the Gem State Electric Company.

Q. At Idaho Falls? A. Yes, sir.

Q. For what period of time have you been engaged in electrical work or in the electrical field?

A. That period of time would be somewhat indefinite. It would extend over a period of probably 30 years, of which time five or six years I was out of the game.

Q. On November 4, 1950, what was your work, Mr. Rising?

A. I was State Electrical Inspector.

Q. Was that for the State of Idaho?

A. Yes, sir.

Q. And by whom were you employed?

A. By the State of Idaho.

Q. After November 4, 1950, I will ask you if you had occasion [202] to inspect this sub-station at the Pacific Fruit Express Company plant?

A. Yes.

Q. And what date was that?

A. That was January 18, 1951.

(Testimony of Harold W. Rising.)

Q. Mr. Rising, I will ask you if you will step down and examine Exhibit No. 20 that is attached to the board. Now then, I will ask you if that is a fair representation and illustration of the sub-station when you visited it in January of 1951?

A. Yes, as nearly as I can remember it.

Q. Mr. Rising, based upon your knowledge as an electrician and your work as an electrical inspector for the State of Idaho, I will ask you to explain your understanding of the equipment as shown there in that exhibit?

A. You want me to describe it?

Q. Yes, go ahead and describe it.

A. The whole structure is what is known as a sub-station structure. Its purpose is to receive and reduce voltage on incoming power with this equipment shown here (indicating). It is metering equipment here (indicating). The transformers as have been previously been pointed out are these three objects whose function is to reduce the voltage from 12,500 volts between phases to, I believe, 23,000 volts. I am somewhat uncertain as to the secondary voltage. These objects (indicating) are the pole-top [203] switches, the three of them together constitute what is known as a Gandy operated pole-top switch, operated by this handle from the ground. These objects (indicating) four of them are lightning arresters. Their object is to drain off surges of excessive voltage, presumably which excessive voltage would be caused by lightning.

Q. Now, will you just explain what is the fact as

(Testimony of Harold W. Rising.)

to the pole-top switches, as to its operation and what voltage and current coming in it would effect?

A. The operation of the pole-top switch as they were connected at that time would interrupt the flow of current through the conductors that flow down through the cut-outs and down to feed the transformers, which would in effect,—the operation of those switches or the opening of the switch would interrupt the current to every thing except the conductors which feed down through this disconnect to the lightning arresters.

Q. By operation of the so-called pole-top switch was there any method whereby the current coming into the lightning arresters would be eliminated?

A. No, sir.

Q. What method would be required to eliminate the current coming into the lightning arresters?

A. It would be necessary to open these three disconnect switches with a hot-stick. [204]

Q. Now, Mr. Rising, what is meant by the term load?

A. The term load?

Q. Yes, in electricity, what is meant by the load side?

A. The term load side is the opposite side from the feed side.

Q. In this sub-station what would the load side indicate?

A. The load side would be all of the conductors between the disconnecting switch and the metering equipment,—and even the load side of the metering equipment, I presume, I would say between the dis-

(Testimony of Harold W. Rising.)

connect switch and the point where the current leaves the sub-station.

Q. Do you mean where it leaves it or comes in?

A. Where it leaves it.

Q. Mr. Rising, what would be the fact as to the side fed by current down to the lightning arresters, would that be the load side?

A. Will you restate that question, please?

Q. I may not be very clear on that myself. Where was the switch which would disconnect everything in the sub-station or was there such a switch?

A. There was no such a switch.

Q. Was there any switch outside of the sub-station which would disconnect everything in the sub-station?

A. I am afraid that I cannot answer that question.

Q. You don't know?            A. No, sir.

Q. From your knowledge as an electrical man, was it possible [205] by construction to have killed all of the power in that sub-station?

Mr. Anderson: I object to any further testimony by this witness concerning this question just asked, I think I can see what he is getting at. I object until it is first established that the Union Pacific either owned or operated this sub-station, otherwise there is no connection.

The Court: The objection is overruled, I think there is some evidence in the record now.



(Testimony of Harold W. Rising.)

Mr. Racine: I will ask that question again and possibly reframe it a little.

Q. Was there a method of construction to have so constructed that sub-station so that the pole-top switch would cut off all the power coming into the station?

Mr. Anderson: We object to that as not within the issues of this case and there is no connection whatever with the railroad.

The Court: I cannot say at this time, the objection is overruled.

A. It would have been possible by construction to have accomplished that purpose in two different manners; one of which would have been to have tied in the lightning arresters on the load side of the disconnect switch,—the other would have been to put the lightning arresters [206] outside of the sub-station as they now are.

Mr. Anderson: I move to strike the last portion of that answer as something that has occurred since this accident.

The Court: Something that happened since, yes, the last part in regard to the change since the accident will be stricken.

Mr. Casterlin: And will the Court caution the witness as to any further statements?

The Court: I think he understands it now. However, I will say that anything that happened since the accident should be eliminated from your testimony.

Q. Mr. Rising, at the time you inspected the

(Testimony of Harold W. Rising.)

sub-station do you have an opinion as to whether or not that sub-station, as it existed, was hazardous?

Mr. Anderson: We object to that as not within the issues and certainly it is not binding on this defendant.

Mr. Racine: I understood that the witness had answered in a measure that he had pointed out some hazards on the exhibit.

Q. I will add to the question as shown by the exhibit, do you have an opinion as to whether this sub-station was hazardous at the time you inspected it? [207]

Mr. Anderson: We object to that as calling for a conclusion of the witness.

The Court: He is an expert, he may answer.

Mr. Anderson: If I may add to the objection it is not justified by the pleadings and it is not shown that the railroad operated the sub-station.

The Court: He may answer.

A. Yes, sir.

Q. And what is your opinion?

Mr. Anderson: Now, I would like to renew my objection. It seems they are trying to go backward on this matter, looking at it from circumstances that resulted from the accident rather than what actually would be the prevailing situation.

The Court: He may answer.

A. It is my opinion that the 12,500 volt conductors within reach of any person who might be inside the enclosure, whether authorized or otherwise would be hazardous.

(Testimony of Harold W. Rising.)

Q. What other matters did you observe with regard to the exhibit, if any, that would make the situation hazardous?

Mr. Anderson: I would like to have the same objection to this question.

The Court: Very well, and the same ruling. [208]

Q. You hesitate, Mr. Rising, perhaps you didn't understand my question. Why is it hazardous, as you understand it?

Mr. Anderson: And I would like the same objection to that question.

The Court: The same ruling.

Mr. Anderson: And if the Court please, we are not charged with hazardous construction of that sub-station. We are charged with furnishing electricity to the sub-station and also by allegation, operating the sub-station, of which there is no evidence.

The Court: Paragraph four, I think, covers it, he may answer.

A. If I understand your question correctly, my answer would be that these conductors energized at 12,500 volts between conductors would be hazardous to any person who might be working inside of that area, because they might, either through lack of knowledge or misunderstanding or through accident come in contact with them.

Q. What, in your experience, is done to correct such a situation?

Mr. Anderson: Now, we object to that, we are talking about an event that has happened, some-

(Testimony of Harold W. Rising.)

thing that previously happened. In other words, they are trying to determine reasonable care after the event.

The Court: Confine your testimony to [209] what could have been done prior to the accident to prevent it.

A. It is the general practice where this type of arrester is used, or a similar type, to mount them on a high pedestal or to put them beyond reach, and beyond accidental contact. The safety code also provides that there shall be barriers where such conditions do exist.

Q. And does that code provide for barriers in addition to the barrier around the sub-station itself?

A. Yes, sir.

Q. What is the practice in the electrical industry as to the markings within the sub-station to indicate the various matters regarding the switches and equipment carrying voltage?

Mr. Anderson: May it be agreed that we have objections to all of this line of testimony?

The Court: I don't like to take an objection of that kind because I may not understand whether the witness is still testifying on the same subject or not. You may renew your objection and as to this I will make the same ruling now.

A. Where hazardous conditions exist generally it is the practice to post warning signs. I don't know that it would necessarily apply inside the enclosure of a sub-station.

(Testimony of Harold W. Rising.)

Q. What is the fact with respect to switches, whether they are [210] open or closed?

A. Switches are required to be marked in such a way that will indicate whether they are open or closed.

Q. Mr. Rising, based upon your experience as an electrician and as an inspector, did this installation here, in the condition shown by the exhibit, and in the condition which you saw in January of 1951, comply with the ordinary safe and proper installation as to sub-stations of that type?

Mr. Anderson: We may have the same objection that I have made heretofore and on the same grounds previously urged?

The Court: Yes, you may, and your objection is overruled, he may answer.

A. I cannot state as to whether the switch indicated whether it was open or closed. As to the condition of safety there were no barriers around the hot conductors and they did come down within approximately three and a half feet of the ground, which would be not according to the custom.

Q. Are those conditions readily ascertainable and can they be observed by an electrician?

A. A qualified electrician who is familiar with sub-stations, using ordinary care probably would distinguish it, yes, sir.

Mr. Racine: You may inquire. [211]

#### Cross Examination

Q. When you inspected this sub-station on Jan-

(Testimony of Harold W. Rising.)

uary 18, 1951, you knew that it was a Pacific Fruit Express Company sub-station, didn't you?

A. I was directed to go to the Pacific Fruit Express Company sub-station and I went to that one.

Q. Now, if those disconnect switches above the lightning arresters had been pulled then the lightning arresters would have been de-energized?

A. Yes.

Q. And if that had been done, from what you have testified to, it would not have been considered an unsafe sub-station, particularly as to the plaintiff here, would it?

A. I would like to be sure that I understand your question.

Q. If all the power had been de-energized in the sub-station there would have been nothing unsafe, so far as the plaintiff, Mr. Johnson, was concerned?

A. At the time when the disconnect switches were pulled or open it would not have been unsafe, that is correct.

Q. So the question then probably was, if there was anything unsafe about it, it was the manner or the method in which it was operated, is that correct?     A. No.

Q. You said that if the power had been de-energized it would [212] have been safe?

A. That is correct.

Q. Now then, if the power had been de-energized it would have been a safe place for Mr. Johnson to work?     A. Yes, sir.

Q. So the pulling of the disconnect switches or

(Testimony of Harold W. Rising.)

the opening of the disconnect switches is a method of operation?      A. I would say so, yes.

Mr. Davis: Has the witness answered the question he said he did not understand?

The Court: Yes, all of the questions have been answered, I don't know whether he wants to follow that out or not.

Q. You would say this, would you not, Mr. Rising, if these disconnect switches leading to the lightning arresters had been pulled, LaVerl Johnson would not have been injured?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. So there would have been no danger in the sub-station at all?

A. As of that time, none.

Q. That is the only time that we are concerned about, isn't it?      A. Yes, sir. [213]

Q. This sub-station has a fence around it, doesn't it?      A. Yes, sir.

Q. That is the usual and customary practice?

A. Yes, sir.

Q. I suppose that any sub-station is dangerous to the uninformed, isn't it?      A. Yes, sir.

Q. Is that the one reason why they keep them lock up?      A. Yes, sir.

Q. Did you investigate enough to find out that there was a cutoff switch on the Pacific Fruit Express Company line from the sub-station over to

(Testimony of Harold W. Rising.)

where it connects on the so-called Batiste power line?     A. No, sir.

Q. You did not investigate that?

A. No, sir.

Mr. Anderson: I believe that is all.

Redirect Examination

Q. (By Mr. Racine): Mr. Rising, would it be customary and safe and proper for a non-electrician to operate the pole-top switch or the disconnect switches in that sub-station?

A. It would be safe to operate,—do you mean the pole-top switch?

Mr. Racine: Would you read the question, [214] Mr. Reporter?

(Question read by the reporter.)

A. It would be safe to operate the pole-top switch but it would not be proper because no one but a qualified person should enter that sub-station except in company with or in the company of an under the supervision of a qualified person. As far as the cutout switches are concerned I would not consider it safe for anyone but a qualified person to operate them.

Q. If a qualified electrician had operated the pole-top switch and opened it, what would have been his duty in your experience as to the disconnect switches?

A. He should also have pulled the disconnect switches.

Mr. Racine: That is all.



Mr. Anderson: I have no further questions.

ELMER V. SMITH

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Davis): You are a resident of Pocatello, Mr. Smith? A. Yes, sir.

Q. And you have a family, do you?

A. Yes, sir. [215]

Q. How long have you lived in Pocatello?

A. Almost continuously since 1917.

Q. What is your business or profession?

A. Electrician.

Q. How long have you been an electrician?

A. My first work was in 1907 and excepting for a short time during World War I, I have been continuously employed at electrical work or inspection.

Q. And were you in any electrical capacities in World War I? A. Yes, sir.

Q. And what was that?

A. In the 37th Engineers during World War I, in the United States and also France. In France I had charge of power lines, generating stations and sub-stations.

Q. Did you work in any electrical capacity or as an electrician during World War Two?

A. Yes, sir.

Q. During World War Two?

A. Yes, during World War Two I spent ap-

(Testimony of Elmer V. Smith.)

proximately 11 months in Alaska working on various voltage lines and numerous transformer installations. After 11 months in Alaska I spent several months with the Aluminum Company of America at Riverbank, California, on transformer installation. Following that I was on a tanker in the Pacific for two years and eight months. This tanker was equipped wholly [216] with alternating current. They had a sub-station of similar size and usefulness on the ship. I serviced that equipment and this ship as a whole and I stayed until 1946, in May.

Q. And what have you done since 1946?

A. I worked for contractors in Seattle, Washington, and these contractors were serving the Texas Company in the states of Oregon and Washington.

Q. And what type of work did you do there?

A. That was electrical work within the buildings and structures owned by the Texas Company; mainly low voltage work.

Q. Have you had any experience as a contractor and in your own business in the electrical line?

A. Yes, sir, in this town.

Q. And what business did you operate in this town and for how long?

A. The Main Electric on East Center from 1923 up to 1939.

Q. Have you had experience in constructing all different types of electrical high voltage lines, substations and general installations?

(Testimony of Elmer V. Smith.)

A. My experience has reached to 110,000 volts but not in excess of 110,000.

Q. Have you had experience up to that voltage in general electrical construction work, including construction of sub-stations? [217]

A. Yes, sir, I have, including sub-stations.

Q. Are you familiar with that type and class of work as an electrician?

A. I consider myself to be familiar with it.

Q. Are you familiar with the National Safety Code, what is generally called the Safety Code?

A. There are two codes, the Safety Code is one and the National Electrical Code for electrical construction is the other. I am more familiar with the National Electrical Code than with the National Safety Code.

Q. You have had occasion to make yourself familiar with it and to observe it and to work under the conditions it sets forth?

A. I have, on numerous occasions.

Q. Now, Mr. Smith, are you familiar with the state, that is with the Idaho minimum general safety standards and practices as adopted by the Idaho Industrial Accident Board?

A. I am familiar with it and I have referred to it frequently on the AEC installations.

Q. You refer to the AEC, what experience have you had in that?

A. On one project I was a journeyman electrician; on another I was foreman and on still an-

(Testimony of Elmer V. Smith.)

other project I was inspector for the Valo Nox Company.

Q. By the AEC construction you mean the construction that we [218] know as the Arco or desert construction?     A. That is correct.

Q. That is where you did that work?

A. Yes, sir, except previous to that I was at Hanford for about three months, that was also for the AEC.

Q. Now, did I ask you, Mr. Smith, how long you lived in Pocatello,—I guess I did?

A. No, but I came here first in 1917 and I lived here until I left during the war and then I returned in 1919 and I spent four years in Southern California after the war and returned here in 1923 and have been here most of the time continuously since, except for the periods that I was in the Pacific during World War Two and the time I was in Alaska and Seattle.

Q. Since 1923, have you had your own business or did you immediately after 1923 have your own business in Pocatello?     A. I did.

Q. Were you generally familiar as an electrician, with the general plan and the sub-stations and the distribution system of the Idaho Power Company in this town?

A. I was quite familiar with it, even more so after I became city electrician.

Q. How long were you city electrician?

A. Approximately two years.

Q. When was that? [219]

(Testimony of Elmer V. Smith.)

A. From early in 1939 until a month after war was declared in 1941.

Q. During that time, as city electrician, did you become familiar with the distribution system of the Union Pacific Railroad Company in distributing electricity in Pocatello?

A. No, I did not because at that time the city had no jurisdiction or at least conceded that it had no jurisdiction over the Union Pacific lines.

Q. Did you know, during that time, whether the Union Pacific Railroad Company did have a line or system of their own that they used?

A. Yes, I knew that.

Q. Were you familiar with the sub-station, a picture of which is set up here (indicating) as Exhibit No. 20? A. At what time?

Q. At any time before November 4, 1950.

A. Only by passing in a car on North Harrison or North Main and observing it, you might say, out of the side of my eye.

Q. Just generally as an electrician would?

A. I had no interest in it, I just glanced at it.

Q. Calling your attention to Exhibit No. 20, have you familiarized yourself with it, and have you studied that picture? A. Yes, sir.

Q. Were you here and did you hear Mr. Gilbert's explanation of [220] the matter and Mr. Rising's explanation of the construction and how it was set up? A. Yes, sir.

Q. That was, in your opinion, a fair description, was it? A. Quite clear but incomplete.

(Testimony of Elmer V. Smith.)

Q. Incomplete?

A. Quite clear and fair as far as it went but incomplete.

Q. Will you complete any part of that which in your opinion was incomplete?

A. There is another photograph which will show the north side of the transformer rack.

Q. Now, you have been handed an exhibit, what exhibit is that, Mr. Smith?     A. 17.

Q. Just go ahead with your explanation on that.

A. This Exhibit No. 17 is taken from the north side of the sub-station showing quite clearly the operating device for the pole-top switch. Along side of this operating device is a sign and it says: "Warning Disconnecter, Do not operate under load." On the left side of the sign it shows four arresters. On the right side of this sign and operating handle it shows three transformers and the metering equipment and shows the secondary bus. The point that I noticed mostly that they overlooked was the fact that this disconnecting switch was hanging vertical in [221] this photograph. You cannot tell from the position of the handle or the position of the mechanism it is connected with, whether it is on or off.

Q. What is the objection, from an electrician's standpoint or from the code, what should the condition be?

Mr. Casterlin: I think the defendant will object to this on the ground that it runs to a construction which has already been completed and into which

(Testimony of Elmer V. Smith.)

power, from some source, is delivered and there is no evidence in this case that the Union Pacific Railroad, this defendant, constructed this transformer site, and there is no allegation in the complaint that the injuries received by LaVerl Johnson, the plaintiff, resulted from the faulty construction or the construction of the transformer and its condition, the only allegation is that this defendant is charged with negligence in the furnishing of electrical energy and the operation of an electrical sub-station. This line of testimony runs to the original construction and they are trying to show by this, that the sub-station is faulty in its construction, and the fact that the sub-station is faulty in its construction has no relation whatsoever to the furnishing of electrical energy or the operation of it; that the operation of this sub-station in the condition in which it was, was faulty or caused the injury. Now, there is a distinction between [222] the operation of a faulty installation and the construction of a faulty installation, that is the point that I wish to object on.

The Court: I think it is all covered by the allegation, the objection is overruled. He may answer.

Q. Do you have the question in mind, Mr. Smith?

A. I would rather have the question read again, if I may.

(Question read by the reporter.)

A. I will continue with my answer, an electrician,—his objections would be that unless a switch

(Testimony of Elmer V. Smith.)

is so marked as the safety code calls for, that there is some risk and hazard, and furthermore not being locked and it is arranged for locking,—not being locked at the time I saw it would be an additional hazard, but on the other hand it could be easily discerned by an experienced person if at such a time they were checking the fuses on the metering devices or reading the meter; they could easily see that the pole-top switch did not operate the disconnecting device for the arresters.

Q. Just a moment, Mr. Smith, if I may interrupt you a second. What is the duty of one furnishing and conveying electricity to another, or a customer, upon observing a condition such as you have described there, or upon observing a dangerous condition with reference to the continued furnishing of it [223] under such conditions.

Mr. Anderson: We object to that, if the Court please, that is a question for either the Court or the jury. It calls for the conclusion of the witness.

The Court: I think the question is poorly framed but he is an expert and I would permit him to give his opinion on it.

Mr. Anderson: They are asking him a question of law, your Honor.

Mr. Davis: Would the Court like me to reframe the question?

The Court: I think you should. I think your question should only go to what his opinion is.

Mr. Davis: Very well.

Q. Mr. Smith, basing your answer now upon the



(Testimony of Elmer V. Smith.)

condition that you have been describing there, from the exhibit and based upon your knowledge as an electrician and upon your knowledge of the National Safety Code, have you an opinion as to what the duty of one furnishing electricity under those circumstances,—yes, I will leave it that way, as to what would be the duty of one furnishing electricity under those conditions,—have you an opinion?

The Court: You may answer that question yes or no. [224]           A. Yes.

Q. And what is your opinion as an expert?

Mr. Casterlin: If the Court please, we object to this question on the ground that it is invading the province of the jury and the province of the Court. The allegation in the complaint is that the defendant violated the rights of the plaintiff and this witness is asked in substance and effect, if the defendant has violated that duty. He is not being asked the question which I think counsel intended to ask him. He has asked the question whether or not he has, that is, the defendant has violated that duty, which necessarily involves the inference that it owes a duty in that respect and has violated it and that invades the province of the Court and the jury and attempts to pass or passes upon the merits of the allegations of the complaint.

The Court: I take it the only way the jury or the Court or anyone else could get any information on this matter is from the opinion of experts. There would have to be some foundation for the jury to pass up on the question that would be submitted

(Testimony of Elmer V. Smith.)

to them. The only way I know of that they could get that information would be from physical conditions and from opinions of experts. This man is qualified as an expert. There is only one part of the question that possibly should be eliminated and that [225] is the safety code, because the safety code is not in evidence. I will let him answer.

A. My opinion in this is,—I don't know whether to use the word "duty" or "practice". But in my observation over previous years, the power companies and other distributors of electricity will not, knowingly, and if it is within their knowledge, deliver electricity to hazardous installations; the principal purpose of that is to protect their other equipment ahead of it. In other words, in this case, the Batiste Springs Power Line and Water Supply depended upon the same circuit so it strikes me that they would hesitate, or should hesitate to supply current to a hazardous installation.

Q. Now, Mr. Smith, calling your attention to Exhibit No. 20, was that installation as shown by the picture,—by the exhibit, which shows the conditions as of November 4, 1950, have you an opinion as to whether or not that is a hazardous installation?     A. Yes.

Q. Have you an opinion, Mr. Smith, as to whether or not that is a proper installation?

A. Yes.

Q. Have you an opinion, Mr. Smith, as to whether or not that installation conforms with the

(Testimony of Elmer V. Smith.)

general practice of those distributing or furnishing electricity through such sub-stations? [226]

A. I have such an opinion.

Q. Mr. Smith, give us your opinion as to what is hazardous about the construction of that sub-station as shown in Exhibit No. 20.

Mr. Casterlin: That is objected to as no proper foundation is laid in this case in which the Union Pacific Railroad Company is the defendant.

The Court: The objection is overruled.

A. I would like to show you with the exhibit.

The Court: You may step down there.

A. The numerous hazards here were,—I don't know where to start, but the first hazard I noticed approximately one or two minutes after entering the gate. The first hazard upon entering the gate, that I noticed, was the fact that bare conductors were very much in evidence within six feet and six inches of the ground and long before a man approached the disconnect he is going past these hot conductors. He has to turn to the left and again to the right and travel a distance of approximately 30 feet before there is any possible chance of de-energizing any portion of this sub-station and anyone not highly experienced would be traversing that great an area before there was any possible chance of disconnecting the current. My first impression was that no person should enter the sub-station, [227] that is, its inclosure from the west side, the gate should be properly on the north side immediately opposite the disconnect switch and the meter-

(Testimony of Elmer V. Smith.)

ing device and without such prior arrangement it would have been much safer and much better that this line be de-energized elsewhere; either at its source or the junction of the Batiste Springs Line. Then after you do reach the disconnecting device, it is not labeled which way to twist this handle to turn it on or which way to turn it off. It is arranged to be locked either in the open position or the closed position but to my observation there was no pad-lock there at the time that I saw it. The sign alongside this disconnecting switch called a disconnecter,—it is a pole-top switch operating the three pole areas of the line simultaneously with this iron handle below, which is grounded, the iron handle is considered safe because it is a well grounded construction but this disconnecter does not state clearly that it turns off all of the equipment in the substation, it merely leaves the inference that this connector does the work, but I immediately saw when I looked up that this line here, coming down through here (indicating) to the arrester,—this line tapped here and this third line tapped here,—it took me less than a minute to observe that.

Q. Mr. Smith, all of that is shown by this picture? [228]

A. That is shown by this picture quite clearly. Those three wires going to the lightning arrester are not connected to the disconnecter switch, the one shown on the side. The one that has the sign on it inferring that it disconnects current. Now, any person operating that disconnect switch with any

(Testimony of Elmer V. Smith.)

knowledge, any experienced person about to enter this inclosure should by all means obtain a hot-stick and disconnect these three connectors ahead and above the lightning arresters. Now, in the event that is not done, the inclosure is not safe for another reason, because arresters of this type should have an inclosure within the inclosure, even experienced persons should not be permitted to come close to these arresters in making repairs or adjustments or even reading meters.

Q. Mr. Smith, are these things that you are calling attention to,—are they ascertainable or discernible to any qualified electrician?

A. Yes, sir, to a qualified electrician.

Q. What do you say, Mr. Smith, as an electrician, as to whether it would be the customery practice for anyone,—any layman not qualified as an electrician to enter that sub-station to pull the pole switch or any other switch?

A. Entering that sub-station with the energy of 12,500 volts,—

Mr. Casterlin: May we have our objection [229] to that question?

The Court: Yes, and the same ruling.

A. Entering that sub-station with that much energy is hazardous to any person, experienced or inexperienced person, until such time as that pole switch is operating, then it is still hazardous after they get around on the other side where the arresters are. An experienced person, to do any work in this, under the regulations generally enforced

(Testimony of Elmer V. Smith.)

by electrical workers, one person never works alone on a 12,500 volts.

Q. Do you have an opinion as to whether or not it is proper or was proper with the conditions as shown on Exhibit No. 20 for anyone, qualified or unqualified, to enter that inclosure alone. Do you have an opinion?

A. Yes, sir, I have an opinion.

Q. And what is that opinion?

A. That opinion is that no person should be alone on entering that inclosure.

Q. And do you have an opinion as to whether it is customary for people who are not qualified as electricians to enter such inclosure as that?

A. I have an opinion.

Q. And what is that?

Mr. Casterlin: To which we renew our objection and also on the additional ground that we are not [230] interested with custom but with the fact as it was here.

The Court: He may answer.

A. The only time an inexperienced person should be permitted in that inclosure is in company with a qualified person, one definitely qualified in high voltage.

Q. Mr. Smith, do you have an opinion from your experience as an electrician what the general custom and practice of a conveyor of electricity or one furnishing electrical energy such as furnished through this sub-station here to the Pacific Fruit Express Company,—do you have an opinion

(Testimony of Elmer V. Smith.)

as to what would be the ordinary custom and practice, upon an electrician observing the conditions that existed there?

Mr. Anderson: Now, that has been answered, he has gone into great detail on that in answering another question and we object to its as repetitious.

The Court: Well, I am not sure whether he did or whether he did not, I think he did but I will let him answer.

Mr. Davis: I was afraid, your Honor, that that portion was not gone into, I was afraid that his answer went to that one particular switch and I didn't want the question raised that this was not in the record.

The Court: He may answer.

Q. Do you have an opinion? [231]

A. I have an opinion.

Q. Give us that opinion?

Mr. Casterlin: Now, we renew our objection.

The Court: The same ruling.

A. Will you phrase that question again so that I can get it sure?

Q. What I am asking is what the general practice would be in the electrical industry of one who was furnishing, who was selling electricity through such a sub-station as that, under such conditions when they observed them or if they did observe them, as to whether they would continue to furnish the electricity?

A. In my mind,—

Q. I want your opinion, Mr. Smith?

A. In my opinion it is incorrect to continue to

(Testimony of Elmer V. Smith.)

supply current under known hazardous conditions.

Q. What makes you say that?

A. Because, as I said before, they hazard their own equipment, the operation of the equipment by tying on to lines.

Q. But what about hazarding lives and property?

A. Well, any hazard is still a hazard, whether it is on this line or the Batiste Springs line,—it is still a hazard to lives and property.

Q. What is your opinion as to the duty of one who furnishes electricity to another for pay, when they observe such [232] condition as existed at the time and place where the electricity is metered?

Mr. Anderson: We object to that as repetition, certainly that has been answered.

The Court: I will let him answer.

Mr. Casterlin: There is another question, I doubt that the foundation has been laid for this kind of question.

The Court: I think sometimes the witness has some difficulty in remembering the questions or possibly in understanding them, but I will let him answer.

A. Yes, I do know what the question was and so far as the duty is concerned I would say that it is the duty to refuse, it is their duty to refuse to continue to furnish electricity under known hazardous conditions.

Q. And that, as shown on the exhibit would be a known hazardous condition?



(Testimony of Elmer V. Smith.)

A. I would say so, it is quite apparent.

Q. Do you think that you have pointed out the different hazards as shown by the exhibit?

A. There are more hazards there but it is rather hard to show them all. The 12,000 volts come down these three cut-outs, approaches the transformer at the same elevation that the 2300 volts leaves the transformer and the wires are bare [233] within six feet six inches of the ground, although that isn't so expressly apparent as the wires that lead to the lightning arresters.

Q. Mr. Smith, have you an opinion as to whether or not, taking the condition as it existed when this picture was taken November 4, 1950, whether that installation as shown there is a standard or proper installation in this particular community and in the city of Pocatello, do you have an opinion?

A. Yes, I have an opinion.

Q. And what is your opinion as to that?

Mr. Casterlin: We object to that on the ground that it is a double question. First as to whether it is a standard installation and, second, as to whether it is proper, and in addition we object to the expression of an opinion on the ground that has heretofore been stated.

The Court: He may answer.

A. The arresters by all means are not standard equipment; they were virtually abandoned by power companies in the 1920's. I don't know whether it was in the early '20's or later in the '20's. The only time I ever knew of them being re-used other than in

(Testimony of Elmer V. Smith.)

this case was when they were purchased from one point, and the entire thing, transformers and arresters, were moved to another point, the whole thing moved in its [234] entirety,—it wasn't an original purchase. Along in the '20's, about '27, the pellet type of arrester came into use and since then I don't know of any company that ever sold this type of arrester.

Q. Was it proper, in your opinion at that time to continue to furnish electricity in this amount and of this voltage of current under those conditions with that arrester or arresters, in November of 1950?

Mr. Anderson: We object to that as repetition.

The Court: He can just answer it yes or no, I believe.

A. No. I would like to make that clear, if I may.

The Court: Yes, go ahead.

A. The reason I say it is not proper is because the installation, the method of installation was more hazardous than the arresters themselves.

Mr. Davis: I think that is all.

The Court: We will recess at this time for 15 minutes.

November 23, 1953, 3:00 o'clock p.m.

### Cross Examination

Q. (By Mr. Anderson): Mr. Smith, if those disconnect switches leading to the [235] transformers had been disconnected before the plaintiff, Mr. Johnson, had gone in there then it would have been

(Testimony of Elmer V. Smith.)

safe and Mr. Johnson would not have been injured, that is correct, isn't it?

A. No,—you said the transformers and I don't believe that you meant the transformers.

Q. I meant to say arresters,—if the disconnect switches had been pulled, leading to the arresters, then Mr. Johnson would not have been injured, would he?

A. Well, I cannot state exactly whether that would be the final culmination.

Q. Would it de-energize the lightning arresters?

A. Yes, but the question is how to de-energize the lightning arresters.

Q. By pulling the disconnect switches?

A. Yes, but how would you pull them, certainly not with your fingers.

Q. Certainly not, I would not and you would not pull them with your fingers, but irrespective of how they could have been pulled, if they had been pulled then Mr. Johnson would not have been injured, he would not have received any injuries, is that correct?

A. I presume that would have been the final result, yes.

Q. You know that to be a fact, don't you?

A. Yes, in other words, if there was no energy in the sub-station [236] whatsoever then it would have been certainly safe, yes.

Q. If the gang switches were off to the transformers, which apparently they were, and those disconnect switches were off to the lightning arresters,

(Testimony of Elmer V. Smith.)

then there would have been no energy in the sub-station, would there?

A. Not within reach of the average person, no.

Q. And that being a fact then the sub-station would have been safe for him to work in, wouldn't it?

A. Only at the elevation that he would not have been able to reach the current.

Q. Where would he have had to reach then,—clear up to the top of the sub-station if those things had been de-energized?

A. He could have climbed up any part of the structure and reached hot wires.

Q. Yes, if he had climbed up far enough, but for the purpose of working around the transformers or even the lightning arresters they would have been safe if all of these switches had been pulled around there?

A. Providing he remained on the ground.

Q. Now, Mr. Smith, point out to me where, on this Exhibit 20, where the disconnect switches are, to the lightning arresters?

A. This one here, here is another one and here is the third (indicating). [237]

Q. How high are they above the ground?

A. Approximately 12 feet.

Q. Then he would have to climb up to that, to get above that to become entangled with live wires?

A. That is correct, providing this pole-top switch was open.

(Testimony of Elmer V. Smith.)

Q. We are assuming that the pole-top switch was open?

A. He would have to climb to that point, after those were disconnected.

Q. Below those disconnect switches there would not be,—if all of the switches were pulled, there would not be any electrical energy at the transformer or lightning arrester?

A. That is right, assuming those were open.

Mr. Anderson: If the Court please, I now move to strike all of this witness's testimony on direct examination as being incompetent, irrelevant and immaterial for it now appears definitely that the sub-station was safe enough if it had been operated properly.

The Court: The motion to strike will be denied.

Mr. Anderson: That is all.

### Redirect Examination

Q. (By Mr. Davis): You have been interrogated as to a switch, if the switch had been pulled,—now, what is the standard of practice where a person would enter the sub-station and see the [238] pole switch pulled, what would that person have a right to believe and expect?

A. My first assumption,—

Mr. Anderson: That is entirely repetition, that was all gone into before and it is making this man the judge of someone else.

The Court: I will let him answer.

A. My first assumption when I saw that switch

(Testimony of Elmer V. Smith.)

from outside the gate, the first time I ever saw the sub-station a short time ago,—this disconnect switch as it is called on the side, is intended to disconnect all of the equipment in the sub-station.

Q. I am asking you to refer to the picture, to the exhibit,—I want your testimony based on Exhibit No. 20. Under the custom and practice of electricians or of anyone else, if anyone entered that sub-station and saw the pole switch pulled or open, what would they, under the ordinary custom, have a right to expect as to the energy in that sub-station?

A. That is to be expected in cases of this kind,—that the disconnecter is for that purpose,—to disconnect all of the equipment in there. I would expect it unless I was cautioned beforehand and then, of course, I would look further, the first impression is that the disconnecter would turn off all of the electricity.

Q. The ordinary standard is, if a man entered there that day, [239] at the time that the picture shows the conditions, and if he saw the pole switch open, he would have a right to believe that all of the energy was out of the sub-station, the lightning arresters and everything else, wouldn't he?

Mr. Anderson: We object to that, that is assuming a great deal and making this man the judge of someone else's ability.

The Court: He may answer.

A. Yes, I would assume that all of the electricity would be off if the pole-top was open.

(Testimony of Elmer V. Smith.)

Q. Now, Mr. Smith, your attention on cross examination has been called to the fact that if all of the switches were pulled that it would be 12 feet to a live wire of 25,000 volts?

A. 12,500 volts.

The Court: But that is not an absolute fact, because we know from the evidence that all of the switches were not pulled, there was electricity in the lightning arresters, so we are talking about questions on both sides here, that do not apply.

Mr. Davis: I beg the Court's pardon.

The Court: Go ahead. I was only referring to questions that have been asked by both sides, and that is, if the electricity was all out of this equipment and, of course, we know that it was not all out.

Q. Mr. Smith, in your opinion is it safe practice and was it [240] safe practice, even if all of the switches had been pulled, to have permitted a condition to exist where a person could if he climbed 12 feet, could have touched or taken hold of a 12,500 volt line?

Mr. Anderson: Now, if the Court please, that begs the question there is nothing to support such an assumption.

The Court: He may answer but I think myself that we have had a lot of questions here that do not apply to this case and I am not referring to either one side particular, I am referring to both.

A. In the first place it is not safe for an inexperienced person to go in there alone, if there is

(Testimony of Elmer V. Smith.)

energy there at all an inexperienced person should not go in alone.

The Court: I think that has been answered a good many times.

Mr. Davis: That is all, Mr. Smith.

### Recross Examination

By Mr. Anderson:

Mr. Anderson: All I want to do now with this witness is to clear up what your Honor has stated is apparent.

The Court: Go right ahead.

Q. If there had been no energy and if all of the switches had been pulled then it would be a safe place for this man [241] to have been, would it not?

The Court: Now, Mr. Anderson, it seems that you are basing that on some remark that I made, I am not the one to decide this, the jury is, if they decide that the man could have been injured without any energy in the sub-station then that is all right.

Mr. Anderson: I was asking that as a question of the witness.

The Court: Yes, but I thought you were basing it on some remark that I had made.

Mr. Anderson: I will ask this again.

Q. That is a fact, isn't it, if all of those switches had been pulled in there, in that sub-section, LaVerl Johnson would not have been injured, would he?

A. Perhaps not, but I wouldn't have worked myself, even with my experience.



(Testimony of Elmer V. Smith.)

Q. You have answered my question, he was down around the lightning arresters, if he was there and all of the switches had been pulled in the substation, he would not have gotten a charge of electricity, would he?

A. Under normal conditions, no.

Q. Why did you qualify the answer?

A. Because, if he had his back turned and someone else came in that cage and turned that switch without his knowledge, he would have been electrocuted. [242]

Q. Well, let's not assume something now that has not been established.

The Court: I think we are chasing shadows, if he hadn't gotten in contact with the electricity, of course, he would not have been injured.

Q. And if it had all been turned off he would not have gotten in contact with any electricity, would he?      A. The same answer to that.

Mr. Anderson: That is all.

Mr. Davis: I think that is all.

### HAROLD A. SHOUP

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Davis): Mr. Shoup, you were, on November 4, 1950, and for some four or five years before that the superintendent of the Pacific Fruit Express Company at Pocatello?

(Testimony of Harold A. Shoup.)

A. Yes, sir, I came here in September, 1949.

Q. You were served with a subpoena in which you were requested to bring the form of billing or the billing from the Union Pacific Railroad to the Pacific Fruit Express Company covering the purchase of electricity for the month of November, 1950?

A. That is right and I didn't have them in my possession. [243]

Q. They are in the possession of counsel for the Railroad?     A. That is right.

Q. Mr. Shoup, from whom does the Pacific Express Fruit Company purchase its electricity that it uses in the plant?

A. From the Union Pacific Railroad Company.

Mr. Davis: May I see that billing that you showed me before, Mr. Anderson?

Mr. Casterlin: That is the one that you say you saw before?

Mr. Davis: The one that I saw today.

Q. Do you know whether or not that is a bill received by the Pacific Fruit Express Company from the Union Pacific Railroad Company or not?

A. Yes, sir, it is.

Q. And did that ever come to you?

A. Yes, that is my signature for approval for distribution of accounts.

Q. Was that bill or statement paid?

A. I cannot answer that question.

Q. You don't know?     A. No, sir.

(Testimony of Harold A. Shoup.)

Mr. Davis: I think that counsel has seen this, and we offer the exhibit in evidence now.

Mr. Casterlin: And what is the number of that?

The Clerk: That is No. 21. [244]

Mr. Anderson: We have no objection but I would like, rather than introduce the original to introduce a photostatic copy, these are original records of the auditor——

The Court: It may be admitted and then it may later be withdrawn and a photostatic copy used in place of it, that may be done at any time.

Q. Do you,—please strike that, Mr. Reporter—during the time that you were superintendent did you receive regular billings such as this, monthly?

A. Yes, sir.

Mr. Davis: That is all.

#### Cross Examination

Q. (By Mr. Anderson): You merely approved the bill and sent it to your office in San Francisco?

A. Yes, sir.

Mr. Anderson: I guess that's all.

Mr. Davis: That is all, Mr. Shoup, thank you.

Mr. Davis: If the Court please, I now offer Plaintiffs' Exhibits 23 and 22. I say 23 first because Exhibit 22 is a supplemental order. The two exhibits are general orders of the Public Utilities Commission of the State of Idaho, they are certified copies, as to the [245] adoption of the Bureau of Standards hand book with reference to electricity. Exhibit 22 is a supplemental order to that. I offer

both of these exhibits at the same time because they both pertain to the same thing.

The Court: Is there any objection.

Mr. Anderson: We have had no time to study these but we do object on the ground that they pertain to no issues in this case, and nothing that could be binding on the defendant here, we also object on the ground that they are incompetent, irrelevant and immaterial.

The Court: It is hard for me to say at this time so I will admit them and if it develops later that they are not connected in any way in this case I will strike them.

Mr. Davis: We will not read these or hand them to the jury until they are definitely admitted into the record. I now offer in evidence Plaintiffs' Exhibit No. 24 which is the National Bureau of Standards hand book H32 referred to in the exhibits which were just introduced in evidence which contains the certificate from the Secretary of the Public Utilities Commission with their seal attached setting out that this book contains the rules and regulations referred to in their orders.

Mr. Anderson: We certainly haven't time to [246] go through and read the entire book and we do object to it as being incompetent, irrelevant and immaterial.

The Court: I believe the book is admissible and I will admit it and if there is any reason later why you should make a motion to strike and I feel your motion should be sustained I will strike it.

Mr. Anderson: It is understood that my objec-

tion made to the previous two exhibits goes to this one, your Honor.

The Court: Yes, that is understood and the same ruling.

Mr. Davis: I offer in evidence at this time Exhibit No. 25 which is provided for by the statutes of the State of Idaho and is the Idaho Minimum General Safety Standard Practice as adopted by the Idaho Industrial Accident Board on the 27th day of April, 1950, having to do with outdoor construction, operation and maintenance of electric wires and equipment of the electrical industry. It does have a name there where one of the attorneys wrote on it that it was a part of the Johnson file and it was addressed and is addressed to Mr. Phillips, of course, if there is any objection to that it can be covered or in some other way not included.

Mr. Anderson: This exhibit, like the previous ones does have many things that have nothing to do with this [247] case——

The Court: ——I will admit it at this time but I am of the opinion that it perhaps is a matter for instructions by the Court. If it is provided for by the Statutes of Idaho then, of course, the Court will take judicial knowledge of it and instruct the jury. I will determine later whether it should be stricken and the matter taken care of by instructions.

Mr. Racine: I think it has been agreed, if the Court please, that we may stipulate that the life expectancy tables as shown in Volume III, page 380, of the Idaho Code, the American experience table may be applied to this case and to the age of

LaVerl A. Johnson at the time of the injury and it is stipulated that whatever that table may show as the life expectancy as of that age, would be agreeable.

Mr. Anderson: That is right.

The Court: Then it is so stipulated.

Mr. Anderson: I am stipulating to what the table shows, I am not familiar with what it shows.

The Court: That is right and you lawyers may get together and figure that out.

Mr. Racine: I believe it is 40.17 years.

The Court: Forty years and .17 years, then that is what is agreed upon? [248]

Mr. Racine: That is right, that is what the table shows.

Mr. Casterlin: And that is what we stipulate to, nothing further than that.

### LAVERL A. JOHNSON

having heretofore been duly sworn, testifies as follows:

#### Direct Examination

Q. (By Mr. Racine): Mr. Johnson, you have been previously interrogated and questioned to some extent regarding the events of November 4, 1950. Now, with reference to that day I will ask you whether or not you observed any person in the sub-station just south of the Pacific Fruit Express ice plant on that day, prior to your injury?

A. I did.

Q. Who did you observe in there?

A. I saw Mr. Johnson,—that was Mr. Howard

(Testimony of LaVerl A. Johnson.)

Johnson and another fellow, I didn't know who he was or is.

Q. Mr. Johnson, did you observe how he arrived at the plant that morning?

A. Yes, he came in a pickup and it was marked "UPRR Maintenance".

Q. Prior to November 4, 1950, had you observed persons working around the sub-station?

A. Yes, sir, I had. [249]

Q. Prior to November 4, 1950, had you observed this truck or a similar truck to the one you described, present there?

A. Yes, sir, I have.

Q. Did you see anyone driving that truck during the day of November 4, 1950?

A. Yes, I saw this fellow get in and I saw him leave just prior to noontime.

Q. Was that the man that you had seen in the sub-station?      A. Yes, it was.

Q. Where else had you see him that day around the plant?

A. He had been all over the plant as far as I know.

Q. What had he been doing?

A. He had been taking the tops off these units, that is as far as I got, I didn't see what he did after he got the tops off.

Q. What units do you mean?

A. These transformers.

Q. Is it electrical equipment?

A. Yes, it is, the electrical transformers.

(Testimony of LaVerl A. Johnson.)

Q. LaVerl, after you were out of the hospital, after you had these various operations in the summer of 1951, what did you do then, that is, after the operations, insofar as care or any limbs that you were going to get, what did you do?

A. You mean that late summer? [250]

Q. Yes, that late summer or early in the fall, did you go any place?

A. Yes, I went to Boise to be fitted for limbs.

Q. And were you fitted for limbs?

A. Yes, I was fitted for limbs and sent to this Elks Convalescent home to learn how to use them.

Q. How long were you up there?

A. I was there just a week then.

Q. Did you have any difficulty while you were there insofar as the legs were concerned?

A. Yes, I developed sores on the stumps,—I wasn't able to use them at all and I just more or less sat around and spent my week. At least only one day it was that I had them on and from that time on I just spent my time there.

Q. Did you later go back to all to learn to use them?      A. No, I haven't.

Q. What is the fact as to whether since you have had your limbs, that you have had any difficulty insofar as using them steadily. Will you please explain to the Court and jury what the fact is as to your use of them?

A. Well, constant use,—I have not been able to use them constantly. They develop sores and they swell up and they require soaking in warm water



(Testimony of LaVerl A. Johnson.)

to bring the swelling down and to take out the soreness. At various times there have been infections at different places and areas developed on [251] the legs, requiring me to take the limbs off,—even at times when I have them on I am unable to control them to the extent where I keep from falling down sometimes. At times I fall down and develop some pretty bad bruises from them.

Q. What were your hobbies before November 4, 1950?

A. Well, I was a Red Cross swimming instructor. I had taught swimming for the Red Cross at Downey and Lava Hot Springs and over here at Indian Springs Natatorium. I also liked to ski and I also hunt and fish, I did almost all outdoor activities, nearly all of such activities I participated in.

Q. Is the use of your legs painful to you now?

A. My legs,—the only time my artificial limbs are not paining me is when I have them off. There is pain there at all times when they are laced on, even while I am sitting I am sitting there in a bind and it is pinching.

Q. What special sox, if any, do you have to use?

A. We have what we call stump sox, it goes over the stump and it will progress about 14 inches, they are pure wool and they are quite thick, they are about \$4.00 apiece and they require a great deal of attention to keep them from shrinking, either hot or cold shrinks these things and I cannot use them after they are shrunk, I have to look after them a great deal on that point.

(Testimony of LaVerl A. Johnson.)

Q. Do you have any trouble with your clothing, your other clothing,—well, let me ask, do you have any trouble with [252] your clothing?

A. Yes, sir, all of my trousers,—I have tried to keep my legs from chewing them up, they are all lined with a very slick lining, a stiff slick lining, but even then my artificial limbs chew holes in the material very readily. That lining helps a little,—it slows it up but it seems to cut right through, several pairs of pants have been chewed up and suits and such.

Mr. Racine: If it please the Court, we don't want any question of impropriety here but we do feel that the jury are entitled to see Mr. Johnson and to see his condition. Perhaps it could be that the jury might be excused at this time for a few moments while we take this up with the Court.

The Court: Yes, the jury may retire.

(In the absence of the jury.)

Mr. Casterlin: I would like to make an objection to this demonstrative evidence at this time on the ground that the admission has been made, the defendant has admitted the loss of the two legs as described by the doctor, also the loss of the arm as described by the doctor; having so admitted and if it is not perfectly apparent we will now admit that that is the condition now as has been testified to by the doctor. Therefore, it becomes immaterial and unnecessary in this action to exhibit to the jury the [253] limbs or the stumps of limbs of the plaintiff and it can serve no purpose except to be the

(Testimony of LaVerl A. Johnson.)

means of creating sympathy which will enhance, enlarge and tend to increase the award, if any, which the jury might make. Sympathy being no part of the case, the circumstances being admitted and we see no useful purpose for the demonstration and we think it is unnecessary, and it has been so held by our State Supreme Court.

The Court: I would like to have the authority if I may, I have always understood that such a showing could be made.

Mr. Casterlin: It is in the case of Roy vs. The Oregon Short Line and it is reported in 55 Idaho at Page 404 and in 42 Pacific 476.

The Court: We will take a few minutes recess at this time.

(The following in the presence of the jury.)

Mr. Racine: If the Court please, we would like to show the jury how Mr. Johnson gets into his legs and have it explain what the equipment is, and what he has to have here. He will have to have some help from his wife. Now, you will go ahead, Mr. Johnson, and explain it to the Court and jury.

A. First of all, this is a stump sock that we are taking off. [254] However, to put them on it is just like pulling the skin apart, and then you put on this little job called a filler, it comes out this hole on the side to pull that stump into the socket and therefore securing it into the leg itself. Now, after you have your stump sock on and placed inside of the leg it is buckled up at the top here inside of this ring, that is called a ring, in fact, it is a ring.

(Testimony of LaVerl A. Johnson.)

It goes up to the upper portion of the body here (indicating) and takes the weight on the hip bones mostly, most of the weight is taken here (indicating). Double amputations like this, a bilateral is just too much weight, you can't shift the pain from one side to the other, and you just have to have the rings to take some of the weight off your stumps. Then we lace it up here, just lace it up like you would your shoe laces, right up to the top here; just lace it in to give you more bind, the more bind you can get away from your stump the better off you are at moving along, you have it laced up here and you are not taking all of the pressure against the stump. All of this friction takes more weight off, or direct pull from the stump. When this is laced up and buckled on with the leg in, then we have this little outfit here (indicating) and that comes up over here and my knee cap will stick out, ordinarily here,—right through here, between that cross, this comes up here and this belt goes completely around [255] my waist and it secures to both of these,—this is an elastic of some nature,—very heavy elastic and it is pulled out tight to give me some more pull to straighten the leg out, the elastic helps to straighten the knee out, every time I bend forward the weight bends it and the elastic pulls it back into position, so that I can take the next step, I guess that is about all about the legs,—then, of course, we have the arm here (indicating).

Q. Just a moment, now, LaVerl, can you very

(Testimony of LaVerl A. Johnson.)

well accomplish that by yourself without some assistance?

A. Well, yes, I can put the sock on, and I can place it in there, place the stump in there, that is, I can put it through loosely, I can attach it rather loosely but someone has to put the bind on it so that I can walk around without terrific pain. Someone has to come along to help me lace this up firmly. It would have to be very firm to keep this action down, they have to be almost solid.

Q. Now, go ahead with your description of the use of the arm?

A. Most people say that these aren't used very much. This one has had to have several repairs. This small cable has been replaced, I have replaced that cable and it is only about 18 inches long but the price of it is about \$6.50 for just the cable. These joints have had to be replaced, they break down frequently when they are in use. My webbing [256] has been replaced and it is nearly ready to be replaced again. To put the arm on requires more aid than I have with the one hand. This, I have very little control over, it hangs down or it can be locked up in one position at the elbow. The shoulder joint, I have no control over it whatever. I have a hook and the control of the hook as far as opening and closing it is done with the chest. You can just open and close the hook, it is just opened or closed as far as getting hold of anything is concerned, I have to put it in there to hold it, it doesn't grab very firmly, even then, at that time, when I

(Testimony of LaVerl A. Johnson.)

put anything in it. The only purpose that the arm has been for me is when I go to lift up something. I can lift with the arm until the arm itself gives away. It will break in a joint. It is just like lifting with my shoulder. Then we have one more small item that goes with this, that is this hand. There are very few occasions that you wear this, it is supposed to be very durable and to last a lifetime, but that is just what it is supposed to be, the skin is delicate, I have had to have the skin repaired, —and even then the repairs show up very plainly, —as I say, it is very delicate and very easily torn, in fact, you can rub the skin off, just rub it away, I guess that is the reason that they last a lifetime is because you are afraid to use them. To open and close the hand—it can be opened and closed, and with [257] all of the amputees that I have seen, that is about the extent of the opening, you can hold a small orange quite well and that is about it. You cannot carry an egg because you don't know how much pressure you are putting on there.

Mr. Davis: In view of the objection, I am not saying, of course, what should be shown but I think in justice here that the record should show that this man did not remove his shirt to show his arm or the stub end of the arm at any time, that he was simply showing how this apparatus worked, and at no time was any part of this man's, as I say, the stumps or the arm stump exposed.

The Court: The record may so show.

(Testimony of LaVerl A. Johnson.)

Is there any further questions, Mr. Racine, from this witness?

Mr. Racine: No, I think there is nothing further.

The Court: I would like to complete the examination of this witness this evening, if we could.

### Cross Examination

Q. (By Mr. Anderson): Mr. Johnson, will you tell me what other work you have done before you went to work for the Pacific Fruit Express Company?

A. Well, I have been employed by the Briggs Nursery as a landscape gardener. I have also been employed by Roland [258] Brothers Dairy on the wholesale pickup for milk, and I was employed at Eddys Bakery, I was a baker, and I was in the army.

Q. Were you also employed at the Naval Ordnance Plant?

A. Oh, yes, prior to going to the service I was employed at the Naval Ordnance Plant.

Q. All of this was prior to the time that you went to work for the Pacific Fruit Express?

A. Yes.

Q. What was the nature of that work, let us say at the Naval Ordnance Plant?

A. I was a laborer there.

Q. A laborer? A. Yes.

Q. What kind of work did you do?

A. Well, just general labor, we dug ditches and

(Testimony of LaVerl A. Johnson.)

repaired roadways for cement and things of that nature.

Q. What education had you had at the time of your injury?

A. Well, I had one semester at the University and I had graduated from high school.

Q. Out at the Pacific Fruit Express plant who were your immediate superiors or supervisors?

A. Mr. Shoup at that time and Mr. Johnson, Howard Johnson.

Q. Mr. Shoup, was the plant manager of the ice plant of the Pacific Fruit Express?

A. Yes. [259]

Q. And Mr. H. O. Johnson was his assistant, is that right? A. Yes, sir.

Q. Both of them worked for the Pacific Fruit Express Company, as you did? A. Yes, sir.

Q. And you got your pay checks from the Pacific Fruit Express for your wages, didn't you?

A. Yes, sir.

Q. Of course, you were not working for the Union Pacific Railroad Company?

A. Not at that time.

Q. And you never had worked for the Union Pacific? A. No, sir.

Q. Now, the ice plant out there, what does that do,—does that provide ice for the refrigeration of cars? A. Yes, that is right.

Q. Did you work in the ice plant itself, generally? A. Generally, yes.



(Testimony of LaVerl A. Johnson.)

Q. What were your duties there in the ice plant,—what did you do?

A. At the time I was repairman.

Q. As a repairman what did you do?

A. Well, we done just general repair work. I had been doing a little painting and I had been doing a little carpenter work and things of that nature. [260]

Q. Now, on that morning, just prior to your accident what did you start out to do,—say, first please tell me when did you go to work?

A. Eight o'clock in the morning.

Q. And what did you start to do?

A. When I first came to work I was prepared to work in the ice storage room at replacing the floor boards.

Q. Had you started that?

A. I had started.

Q. And how long did you do that?

A. It seemed to me until about nine o'clock, somewhere around there.

Q. And then what did you do?

A. Well, the lights went out and it was dark in there and so I came out; Mr. Johnson says, "I have been looking for you, I have a job for you."

Q. And what was that?

A. He told me to paint those leads coming into those transformers next to the building.

Q. That was there in the ice plant itself, or adjacent to it?

(Testimony of LaVerl A. Johnson.)

A. Right up against the building,—one side of the enclosure is the wall of the building.

Q. How many transformers were there in there?

A. I don't remember.

Q. Was there more than one? [261]

A. Yes, sir.

Q. You were painting the cables into the transformers or the leads into the transformers?

A. In and out, he said, "Paint all the bare wires", and that is what I was doing, that is what I was painting.

Q. They had taping or something of that sort on them, didn't they?

A. I don't even remember of them having any taping, there had been some wrapping of some kind on some of them but I don't know whether it was taping or not.

Q. When did you finish that job?

A. Well, that was just before noon.

Q. And then what happened?

A. I met Mr. Johnson, Mr. Howard Johnson; he came out there by that cage and he told me, "Here is the keys to the other cage and I want you to go and paint it just like you have this one."

Q. Paint the leads into the transformers?

A. He said, "Paint the wires like you have this one", and then I went to lunch.

Q. And then you later come back?

A. Yes, then I had to prepare the paint and everything and get ready to go to work and then I went to work.

(Testimony of LaVerl A. Johnson.)

Q. You took the key and went out and unlocked the gate to the large sub-station? [262]

A. He gave me the keys.

Q. Yes, he gave you the keys?

A. Yes, and I went out and unlocked this large sub-station and in order to keep the paint from rubbing on the wires that had been painted I was going to start from the back of the sub-station and work on out. I tested my first wire and that was the one that was hot.

Q. That meant that you went clear around,—after you came in the gate you went clear around the transformers to your left and back to the rear of the cage to the arresters? A. Yes.

Q. Those transformers, Mr. Johnson, you see them just as you come up to the front of the gate,—they are right in front when you open the gate, aren't they?

A. Yes, those transformers are in front of the gate.

Q. Now, is this the situation,—did Mr. Johnson, Howard Johnson, tell you to paint the wrapping on the wires that went to the transformers in the small cage first, that is, that you did in the forenoon?

A. No, he said to paint all of the wires that I could reach.

Q. All of the wires?

A. Yes, all that I could reach.

Q. You have been handed your deposition. Now, if you will turn to page 14 and I think at the

(Testimony of LaVerl A. Johnson.)

bottom of the page this question was asked: "But you were painting the wrapping around the [263] wires that went into the transformer?" and your answer: "The wires,—the wrappings had come off and they were bare, most of them. There was a few that was still hanging on very shabbily." That is correct, isn't it?

A. It showed signs that it had been there.

\* \* \* \* \* [264]

Q. It is a fact, isn't it,—and I call your attention now to your deposition given on April 29, 1953, which you have in your hand, that Mr. Johnson did tell you—I refer now to page 16 at the top of the page. This question was asked: "And what did he tell you to do over there?" Answer: "He told me to paint that one like I did the other one because it would be the only day that the power would be off." That is correct, isn't it?      A. Yes.

Q. I don't suppose that you paid any attention to the switches when you went into the sub-station?

A. No, I didn't.

Q. Those lightning arresters, they don't look like transformers as you knew transformers?

A. As I knew transformers, they were all transformers.

Q. You didn't know the difference?

A. I didn't.

Q. The lightning arresters in the big sub-station were nothing like the transformers, the leads of which you were painting in the ice plant sub-station that morning?

(Testimony of LaVerl A. Johnson.)

A. I thought a lead was a lead regardless of what it was hooked on to.

Q. I don't believe that you have answered my question; the lightning arresters in the sub-station look nothing like [265] the transformers over in the little station that you were painting the leads on in the morning. They were entirely different in character, were they not?

A. The machine itself was a little different but I thought probably different models.

Q. On your direct examination, when you first went on the stand the other day, you did say that you were instructed to paint electric cables into the transformers. What kind of cables were they?

A. Well, normally speaking they were just wires, but I thought that they were called cables.

Q. They had some wrapping around them, was that so?

A. Some of them did and some didn't.

Q. Mr. Johnson, have you told us who this man was that you saw in the transformer cage on the morning of the accident?

A. No, I don't believe so.

Q. Did you say that you saw some persons in the sub-station that morning?      A. Yes.

Q. One of them was Howard Johnson?

A. I don't believe that I ever saw Howard Johnson in the sub-station that morning.

Q. When was it that you saw him in there,—my first note right after you were recalled, you

(Testimony of LaVerl A. Johnson.)

said that you saw Mr. Howard Johnson and one other fellow in the sub-station? [266]

A. Howard wasn't directly in the sub-station, the other fellow was, Howard was right by him but he wasn't in the enclosure.

Q. Did you see them go in there?

A. No, I didn't see them go in.

Q. You saw them after they were in, did you?

A. I saw this fellow after he was in.

Q. That wasn't Howard Johnson?

A. No.

Q. Was Howard Johnson inside the enclosure at all?     A. No, not at that time.

Q. Did he go in later?

A. I don't mean right at that time, I never saw him within the enclosure that day at all.

Q. Who was it that you saw in the enclosure?

A. I don't know who it was in the enclosure.

Q. Did you see him do anything?

A. Well, I thought it was very odd because I saw him looking down into the top of one of those transformers.

Q. Was he standing on something?

A. Yes, sir.

Q. You don't know who he was?

A. Well, like I said, he had his head looking down inside of this transformer. I don't know who he was.

Q. Where were you located at that time?

A. I was located right where they take the

(Testimony of LaVerl A. Johnson.)

temperature, they [267] have a little cage where they take the outside temperature.

Q. Where is that with reference to the sub-station?

A. The sub-station right near the plant, up against the plant,—it is between that sub-station and the blacksmith shop.

Q. How far from the sub-station were you?

A. Which sub-station?

Q. The one where you were injured.

A. I guess I was 50 yards, well, maybe,—yes, I guess maybe about 75 feet away.

Q. Did you ever have occasion to call anyone at the railroad because of any power failure?

A. I never did.

Q. Do you recall, Mr. Johnson, on about November 27, 1950, while you were in the hospital that Mr. Shoup and Zola Benda came to see you?

A. I cannot say that I do.

Q. You don't remember them coming?

A. No.

Q. I think I may have forgotten to ask you, Mr. Johnson, or maybe you have told me,—did Howard Johnson give you the key to get into the transformer cage? A. Yes.

Q. At that time, when he gave you the key there was nobody around there for the Union Pacific Railroad Company, was there?

A. There was no one there at all. [268]

Q. There was no one from the Union Pacific Railroad Company that told you to paint either the

(Testimony of LaVerl A. Johnson.)

cables to and from the transformers in the cage there at the ice plant or over at the sub-station where you were injured?     A. No, sir.

Q. While you were working at the Pacific Fruit Express you always took orders from Mr. Shoup or Mr. Johnson or someone else that worked for the Pacific Fruit Express?     A. Yes, sir.

Q. You took no orders from anyone connected with the Railroad Company?

A. Well, not at the plant.

Q. While you were working out there in connection with the plant, all of the orders that were given you were given by someone working for the Pacific Fruit Express Company, isn't that correct?

A. Yes.

Mr. Anderson: I think that is all.

### Redirect Examination

Q. (By Mr. Racine): Just one more question, if I may. When you went into the sub-station was anyone present at all?     A. No, sir.

Q. How did you get in?

A. I unlocked the gate and went in. [269]

Q. You unlocked the gate with the key that had been given to you?     A. Yes.

Q. There was no one there at all, neither Howard Johnson or anyone else?     A. No.

Q. This man that was with Howard Johnson, the one that you say that was inside the sub-station, do you know whether he was with the Pacific Fruit



(Testimony of LaVerl A. Johnson.)

Express or in the employ of the Pacific Fruit Express? A. No, he wasn't a PFE employee.

Q. Was that the same man that you had seen in this truck? A. Yes.

Q. Was that the same man that you had seen driving the truck on November 4? A. Yes.

Mr. Racine: That is all.

### Recross Examination

Q. (By Mr. Anderson): You don't know who he was? A. No.

The Court: He has said that a good many times.

Mr. Anderson: That is all.

Mr. Racine: If the Court please, I think [270] we are about ready to rest but if we may have until tomorrow morning we would appreciate that.

The Court: We will adjourn at this time until 10:00 o'clock tomorrow morning.

November 24, 1953, 10:00 o'clock a.m.

Mr. Racine: I wonder if my recollection is right that the hospital records were not stricken.

The Court: They have not been,—I am glad that you called that to my attention. The hospital records were referred to in connection with other matters except his incompetency and I think that the hospital records should remain in evidence. The other exhibits, would you look at them, Mr. Racine, and see if you agree with me as to which ones do not pertain to the hospital records there. I think there is a letter that should be stricken, I think all of the exhibits possibly except the hospital rec-

ords,—I am not sure what were included in your motion but I think the other exhibits should be stricken.

Mr. Casterlin: I understand all that remains are Exhibits 9, 10, 11, 12 and 13, our motion to strike went to all of them.

The Court: Your motion was to strike all of them? [271]

Mr. Casterlin: Our motion was to strike them all and the Court held them in only for the purpose of showing the medication and not for any purpose of incompetency.

The Court: That was only for the purpose of showing the treatment that he received at the hospital.

Mr. Casterlin: That was my understanding and that was only with respect to pain and suffering.

The Court: Now, I am sure that there is one letter that is not in or at least it should be stricken. A letter that she wrote and the answer to it that pertained entirely to the statute of limitation.

Mr. Racine: I understand now that Exhibits 1 to 8 are to be stricken.

The Court: That is right.

Mr. Racine: And 9, 10, 11, 12 and 13 remain.

The Court: Yes, they would remain only as to the treatment he received at the hospital and so on.

Mr. Casterlin: Relating only to pain and suffering.

The Court: That is right.

Mr. Racine: Then, your Honor, at this time the plaintiffs rest.

The Court: The jury may retire for a moment.

(In the absence of the jury.)

The Court: I take it that you probably want to make a motion at this time, and that is the reason that I excused the jury.

Mr. Anderson: I don't believe that we will at this time, your Honor.

The Court: Then, Mr. Bailiff, you may recall the jury.

(The following in the presence of the jury.)

The Court: You may make your opening statement.

(Opening statement made by Mr. Anderson.)

Mr. Anderson: Before we start, Mr. Racine, in accordance with our previous stipulation, it now may be stipulated that the Pacific Fruit Express and the Union Pacific Railroad Company are separate and distinct corporations organized under the laws of the State of Utah and are qualified to transact business in Idaho and were qualified to transact business in Idaho prior to and as of November 4, 1950.

Mr. Racine: That is our understanding.

The Court: Then it may be so stipulated,—that will save us a great deal of time.

Mr. Anderson: I would like to call my first [273] witness perhaps a little out of order so that he may get away.

The Court: That will be perfectly agreeable.

EARL R. GILBERT

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Anderson): Your name is Earl R. Gilbert?     A. That is right.

Q. And you have previously testified in this case?     A. Yes, sir.

Q. I take it that you are familiar with the Pacific Fruit Express sub-station which has been discussed here considerably?     A. I am.

Q. Do you know that it was constructed in 1925 or thereabouts?

A. It was constructed before I came to Pocatello in 1929,—yes, it was there at that time.

Q. What have you to say, Mr. Gilbert, with reference to whether or not that sub-station, at the time it was constructed, or when you first saw it, was a standard type of sub-station?

A. That sub-station was standard at the time; it was a package sub-station, I don't know whether it was a Westinghouse or a General Electric sub-station,—it came as a package job and it was installed as is. It was at the time, in the 20's, [274] yes, that was the latest thing in sub-stations at that time.

Q. Knowing this sub-station as you did on November 4, 1950, can you state whether or not the sub-station and the equipment therein were safe for the delivery of electrical energy of 12,500 volts?

A. Will you state that again, please?

(Testimony of Earl R. Gilbert.)

Mr. Anderson: Will you repeat the question, Mr. Vaughan?

(Question read by the reporter.)

A. The delivery of electrical energy was just as safe as at the time it was installed, there had been nothing done to change that,—it was just as safe as the day it was installed.

Q. Can you state whether or not there was anything defective about the appliances in the sub-station or any connections thereto?

A. They were not defective but they had not been operated safely. Am I making myself plain on that?

Q. Yes. There was nothing defective about the equipment, you say?

A. It was operating just as good as at the time it was installed.

Q. Can you state whether or not it was capable of receiving safely energy that was being delivered to it?

A. Yes, sir, that could be delivered safely as long as the gate was locked. am I making myself clear?

Q. What I mean, Mr. Gilbert, is, did the equipment in the sub-station [275] or rather was that equipment in the sub-station and the sub-station itself capable of receiving electrical energy safely and operate as a sub-station should?

A. Yes, as a sub-station it was delivering service the same as it was originally, that is right.

Q. The condition that the sub-station was in, Mr.

(Testimony of Earl R. Gilbert.)

Gilbert, on November 4, 1950, can you state whether or not there was any reason for not delivering electrical energy to it? In other words, I will put it this way, assuming that the Idaho Power Company, your employer, was making delivery of electrical energy directed to that sub-station, would you advise your company not to deliver electrical energy to it?

A. No, we would not advise them not to deliver energy because the service was always delivered to it,—at that time the sub-station had not been changed; it was safe at the time we started service and there was no reason why service should have been cut off.

Mr. Anderson: That is all.

#### Cross Examination

Q. (By Mr. Racine): Now, Mr. Gilbert, you stated that this was a package type of sub-station?

A. Yes, sir.

Q. As a package type sub-station was the installation and the [276] connection of the equipment and the installation of the switches and the tying in of the transmission lines to the switches in accordance with the safety practices?

A. That was standard at the time when it was installed. May I say this, there was a considerable number of sub-stations of that type installed in the 20's, just exactly like this.

Q. Since the 20's that is not the standard?

A. The standard has been changed since then.

(Testimony of Earl R. Gilbert.)

What I mean by that, the standards are just alike with the exception that if this sub-station had been operated properly, the disconnect pulled, it would have been perfectly safe. That is what the disconnects were installed for. No man should have been in that yard unless he was qualified. The wires were low and there was a possible chance of tripping or falling or reaching to them, that is a hazard that we watch if there is anything hot and a man is in the yard.

Q. Under those circumstances, in the Idaho Power Company, if there had been such a sub-station you would have put a barrier or isolated those lightning arresters in some fashion, wouldn't you?

A. We would have either barricaded it or eliminated it, yes, sir.

Q. That wasn't done on November 4, was it?

A. No, sir, it had not been changed.

Q. And the lightning arresters were within a few feet of the [277] ground with bare, uninsulated wires which a person could touch when the disconnects were not pulled?

A. That's right.

Q. And in so doing, such person would have been injured, maimed or killed?

A. You have 12,500 voltage there which is very wicked.

Q. And from your view of the premises that day, that is exactly what happened to LaVerl Johnson, isn't it?

A. May I digress a moment?

Q. Yes.

(Testimony of Earl R. Gilbert.)

A. I have often wondered what LaVerl Johnson's instructions were,—

The Court: I think you should keep to the question, Mr. Witness. It is quite confusing not to answer the question. Of course, then if you want to make an explanation, that is different.

A. Okay.

Mr. Racine: Will you read the question, please?

(Question read by the reporter.)

A. LaVerl Johnson walked into the 12,500 volts.

Q. At a place where the lines were within a few feet of the ground and where they were not barricaded or isolated?     A. That is right.

Q. And where there were no warning signs or instructions in [278] the sub-station as to the energy in such lines?

A. That's right, after he had unlocked the gate, yes.

Q. And that was at a time when the pole-top switch was open?     A. Yes, it was open.

Q. And the disconnect switches were not pulled?

A. That's right, they were not pulled, if they had been pulled it would have been safe, that is what I was trying to get at.

Q. Isn't it a fact that the lightning arresters as they were situated and existed in that sub-station on that day, were outmoded by many years?

A. I can show you three sub-stations exactly like that, I am wondering how much they are outmoded, there are three sub-stations just like that in this area today.



(Testimony of Earl R. Gilbert.)

Q. They are on the Union Pacific Railroad Company property? A. Not exactly.

Q. Are there any sub-stations where the lightning arresters are located just that way?

A. No.

Q. That is where they are without any barricade, without being placed out of reach?

A. There is one.

Q. Where is that?

A. At Batiste Springs.

Q. And that is owned by the Union Pacific?

A. I suppose so.

Q. It is operated by the Union Pacific?

A. It is located out there where no one can get in unless they are going in for a purpose. \* \* \* \* \*

Q. Mr. Gilbert, you were out to the sub-station on November 4, 1950, in the afternoon?

A. I was. \* \* \* \* \* [280]

Q. In your opinion, Mr. Gilbert, when you saw the sub-station that day wasn't it your opinion that the sub-station as it existed that day and the equipment, located as it was, and the switches, located as they were, were out-moded?

A. I made the statement——

The Court: ——Just answer the question, I think you can answer that one yes or no. I ruled any statement you might have made out.

A. I made the statement, yes.

Mr. Casterlin: Do you want to explain now, Mr. Gilbert?

The Court: Just let the witness testify, you will

(Testimony of Earl R. Gilbert.)

have a chance to examine later. The only reason that I stopped his making the statement was that you had objected to it and I sustained the objection.

Mr. Casterlin: I thought maybe he understood from that ruling that he did not have a right to make the explanation.

The Court: No, I don't think he understood that. He just didn't have the right to make the statement after you objected to it and I sustained the objection. I didn't intend to stop you in any other way, Mr. Witness.

Mr. Racine: Now, I don't know whether Mr. Gilbert answered the question or not. Will you read [281] the question, Mr. Reporter?

(Question read by the reporter).

A. Yes, I think I made the statement.

Q. And is that your opinion, Mr. Gilbert?

A. Can I qualify my statement and say what I meant by that?

Q. Yes.

A. The new type of Pellet arresters absolutely get rid of wires coming towards the ground. They are installed on a rack or a pole ahead of it and it does away with anything on the ground.

Q. It does away with any risk,—the Pellet type arrester does away with any risk of a charge of electricity coming down to the lightning arrester located on the ground, located and installed and connected in ahead of the pole type top switch?

A. This is just a little confusing, what do you

(Testimony of Earl R. Gilbert.)

mean by charge, you mean in circuit, or do you mean a lightning discharge that will bleed off?

Q. In circuit?

A. With your Pellet type arresters, you do not have the wires leading down.

Q. They are on top of the pole?

A. That is right.

Q. On this day, with this type of lightning arrester,—what was that type? [282]

A. This type of lightning arrester is called the dry type of arrester. They have plates with a little gap in the top of it and when the voltage hits a certain voltage, it jumps that gap and goes to ground through the arrester.

Q. Mr. Gilbert, by the Pellet type of lightning arrester will you explain to the Court and jury just what you mean and just where it would be located with reference to Exhibit No. 20?

A. I would not tell you where they would be located, they could be located in several places and still get the same result. Your Pellet type arrester taps on the line on top and taps on the ground on the bottom on a 6900 or what we call a 95. They are approximately that long (indicating). They are porcelain with copper oxide pellets and as the current goes through then it breaks it and the current goes through and it bleeds off excessive current.

Q. But the Pellet type lightning arrester is not located on the ground at all? A. No, sir.

Q. And it is out of reach of all, either qualified

(Testimony of Earl R. Gilbert.)

or unqualified persons, who would be on the ground in the sub-station?

A. It is located up close to the lines.

Q. And now, Mr. Gilbert, in this sub-station isn't it a fact that the lines carrying energy into that sub-station could have been run over another five or six feet in such a manner [283] that it would have eliminated any opportunity of the transformer being de-energized and not having the lightning arresters de-energized?

Mr. Anderson: We object to that as incompetent, irrelevant and immaterial and speculative; trying to determine this after the event and not prior to the event.

The Court: I understood he testified as to the condition at that time, of course, confining the evidence to that time he may answer.

A. Will you re-state that question?

Mr. Racine: Will you please read it, Mr. Reporter? (Question read by reporter.)

A. If you attach that on the load side of the switch,—when the switch would be open then the complete yard would have been dead.

Q. In other words, if these lines, instead of running out here came over here to the——

A. ——No, that is wrong.

Q. Will you explain that to the jury, Mr. Gilbert?

A. This line here (indicating) tapped ahead here, what we call the line side or toward the energized power, had been tapped back of this switch,

(Testimony of Earl R. Gilbert.)

when the switch was pulled, that complete yard would have been dead. [284]

Q. You are referring to the pole-top switch?

A. To this pole-top switch.

Q. Which is operated by the arm?

A. The arm coming down here.

Q. That is different than the disconnects?

A. Yes, when this was open here this is still hot (indicating) but if these were opened here then this would have been dead.

Q. That day out there the pole-top switch was open? A. Yes.

Q. But the lightning arresters were energized?

A. The disconnect had not been pulled. \* \* \* \* \*

Q. In your opinion, would one in the exercise of ordinary care, [285] —an electrician who had knowledge of the condition existing in that sub-station on that day, and of the further fact that unqualified persons were in there from time to time,—would an electrical person or an electrician with such knowledge have taken steps to prevent current from coming into that sub-station?

Mr. Anderson: We object to that, it is certainly calling for a conclusion of the witness and based on something that is not in the record.

The Court: He may answer, he is an expert.

A. I am not an expert.

The Court: The Court is ruling as to that, Mr. Witness, you are not ruling. He is testifying here as an expert, just answer the question if you can.

A. A qualified man should have come into that

(Testimony of Earl R. Gilbert.)

yard to give this man a clearance. That gate definitely states there is high voltage and that warned him, the fence warned him. When you open that gate there should be a qualified man to tell this man what was dead and what was not.

Q. If you had known that an unqualified man or men were going into the sub-station with the conditions that existed there on November 4, 1950, in your opinion, would a qualified electrician with such knowledge attempt to cut the energy or to take steps to see that such unqualified persons were not [286] in the sub-station?

Mr. Anderson: We object to that as repetition, there is no connection here at all and there is nothing to show that the Railroad Company was involved in the matter concerning which questions are asked.

The Court: I think he has answered the question but he can answer it again.

A. At no time would I send a man into that place unless there was a qualified man with him.

Q. And if you had knowledge that such person was in there you would take steps to see that he was protected?     A. Yes.

Mr. Racine: That is all.

### Redirect Examination

Q. (By Mr. Anderson): If the disconnect switch had been pulled the station would have been safe?

A. It would have disconnected all of the yard.

(Testimony of Earl R. Gilbert.)

The Court: Mr. Witness, I don't want you to take any offense at anything I might have said in my ruling, you were qualified here as a witness and I simply indicated that you were testifying as such.

Mr. Anderson: That is all. I suppose that Mr. Gilbert would like to be excused.

The Court: Unless there is some reason [287] for his staying he may leave when he wants to.

Mr. Anderson: I would like to introduce some contracts that have already been furnished to the plaintiffs.

The Court: You may have them marked and shown to counsel.

Mr. Anderson: We offer in evidence Defendant's Exhibits No. 26, 27, 28 and 29.

Mr. Davis: We don't have any objection but I want to call the Court's attention to one thing. There is a paragraph in Exhibit No. 26 and before it was read, if they intend to read it to the jury, I think that would be dependent on the Court's instructions as to whether or not it would be proper and whether or not other instructions should be given on this matter.

Mr. Anderson: I meant to say with reference to Exhibit No. 26 that we offer the whole contract except Sections No. 13 and 14.

Mr. Davis: We object to that, if the contract goes in, of course it goes in as a whole for what it is worth.

The Court: You may proceed and I will rule on this later.

Mr. Anderson: I have some exceptions with reference to some of the other exhibits. Exhibit No. 27 is [288] offered for all purposes. Exhibit No. 28, all of the contract except the description of the land, commencing on Page 1 and referred to as Exhibit A, excepting also Sections 8, 10 and 11. With reference to Exhibit 29, that is offered for all purposes.

Mr. Davis: Our position is this, we have no objection to these exhibits but they cannot pick out any certain portions of the exhibits and say they are offered for all purposes and other portions not offered at all, and some portions limited, if they go in at all they should go in for all purposes, otherwise we object to them as incompetent, irrelevant and immaterial.

Mr. Casterlin: Counsel's position would be right if this was a suit on a contract. This action is not on a contract and there are certain matters that are admissible as evidence and others that are not admissible and that is the distinction that we make.

The Court: It is rather unusual to introduce a writing and then to read one paragraph in and leave out another paragraph. I will admit the exhibits except for one matter that Mr. Davis asks to have read,—I will admit them and then I will permit counsel for the defendants, or rather for the plaintiffs, if they wish to offer the entire contract.

Mr. Anderson: You mean as to all of the [289] exhibits, your Honor.

The Court: I am going to withdraw that ruling that I just made and I am going to take a little



time because I want to look into this. Of course, you understand you gentlemen can make mistakes and they don't amount to a great deal but mine are quite serious in the record.

Mr. Anderson: I won't undertake to read them at this time.

The Court: No, it would be well to pass those exhibits now and I will rule whether I will permit them to be admitted or not.

Mr. Anderson: As I understand it, there is no objection to Exhibit No. 27 and 29.

The Court: That doesn't make any difference at this time, I am not admitting any of them now until I look them over and then I will rule on all of them, I take it if I sustain the objection Mr. Davis has made to the one exhibit then it will be up to you to decide whether you want to offer all of the exhibit or not.

Mr. Anderson: I take it if your Honor, when he has considered these matters if they are admitted they will be read to the jury or may be read at that time.

The Court: That is right. [290]

### HAROLD R. ARTER

being called as a witness by the defendant, after being first duly sworn, testifies as follows:

#### Direct Examination

Q. (By Mr. Anderson): Will you please state your name?           A. Harold R. Arter.

Q. Where do you reside, Mr. Arter?

(Testimony of Harold R. Arter.)

A. 1921 16th Avenue, San Francisco, California.

Q. By whom are you employed?

A. By the Pacific Fruit Express Company.

Q. How long have you been in the service of the Pacific Fruit Express Company?

A. About 34 and a half years.

Q. In what capacity?

A. Well, for 31 years as chief of the department of disbursements.

Q. What do you mean by department of disbursements, is that in the accounting department?

A. That is correct.

Q. And what job do you hold now?

A. Chief clerk.

Q. Of what?

A. The disbursements accounts bureau.

Q. For the Pacific Fruit Express Company?

A. That is correct.

Q. As such, do you have under your charge and control the records pertaining to the accounts which have to do with, let us say, physical property of the Pacific Fruit Express Company in Pocatello, such as the sub-station?     A. I have.

Q. Mr. Arter, I show you what has been marked for identification as Defendant's Exhibit No. 30, will you state what that is, please?

A. That is the estimated cost to construct a power station and transmission line for taking power under combined load with the Oregon Short Line Railroad Company.

Q. At Pocatello?     A. Yes, sir.

(Testimony of Harold R. Arter.)

Q. Just what is the date of that?

A. January 12, 1925.

Q. Is that a record that is in your custody and control and kept in the usual course of business?

A. Yes.

Mr. Anderson: We offer in evidence Defendant's Exhibit No. 30.

The Court: Is there any objection?

Mr. Davis: We have no objection.

The Court: It may be admitted.

Q. Now, Mr. Arter, I show you what has been marked as Defendant's [292] Exhibit No. 31 for identification, will you state briefly what that is?

A. This is an abstract of the actual cost of the work that I just explained.

Q. The amount that was paid as to the other exhibit, is that what you mean?

A. Work order, pertaining to the work order.

Q. What is the exhibit, does it have any reference to Exhibit No. 30?

A. Yes, it does.

Q. And what is that?

A. This is the actual cost.

Q. This is the actual cost rather than an estimate?

A. That is right, the other is an estimate, a work order, and this is the actual cost for that work.

Q. Does that have a date on it?

A. No, it doesn't.

Q. I notice in the left hand corner, Mr. Arter—

(Testimony of Harold R. Arter.)

A. — Yes, it says "Completion report 164, June 17, 1926".

Q. And does it have an account number ahead of the abstract of items, does that have an account number?     A. Yes, 208.

Mr. Anderson: I will offer Defendant's Exhibit No. 31 in evidence at this time.

Mr. Davis: We have no objection. [293]

The Court: It may be admitted.

Q. Mr. Arter, with reference to Exhibit No. 31, what do the items in the abstract there represent, what does that represent?

A. This represents charges from the Union Pacific for performing this work for us.

Q. And paid by the Pacific Fruit Express Company?     A. Yes.

Q. Does that record indicate or can you tell me if the Pacific Fruit Express Company paid the Oregon Short Line Railroad Company for the full cost of the work shown on Exhibit No. 30. I am speaking now of the sub-station and the installation of the transmission lines.

A. That is right, they are all Oregon Short Line bills.

Q. Mr. Arter, I show you what has been marked for identification as Defendant's Exhibit No. 32, will you tell me what that is, please?

A. This is a completion report of the actual cost of the construction of the power station at Pocatello.

Q. Will you tell me which document is made

(Testimony of Harold R. Arter.)

first,—is Exhibit No. 31 or Exhibit No. 32 made first?

A. Exhibit No. 31.

Q. That is made first?

A. Yes, this is an abstract of the actual cost as they go into the accounts. [294]

Q. Exhibit No. 32 is made after that?

A. Yes, sir.

Mr. Anderson: We offer Exhibit No. 32 in evidence.

A. This also balances with Exhibit No. 31.

Mr. Davis: We have no objection to the exhibit.

The Court: It may be admitted.

Q. Mr. Arter, I show you what has been marked for identification as Defendant's Exhibit No. 33, can you tell me what that is?

A. This is a billing from the Union Pacific Railroad Company against the Pacific Fruit Express Company for electrical work done for our account in October of 1948.

Mr. Anderson: We offer in evidence Exhibit No. 33.

A. I might say that there is an additional bill on this.

Mr. Anderson: We offer Exhibit No. 33 in evidence, if the Court please.

Mr. Davis: May I ask a question on this?

The Court: Yes, you may.

Q. (By Mr. Davis): This Exhibit No. 33, that has nothing to do with the construction of the substation and the power lines but is for services ren-

(Testimony of Harold R. Arter.)

dered in connection with the ice crusher and the ice dock?

A. It is my understanding that it has to do with the sub-station. [295]

Q. That it has to do with the sub-station?

A. That is my understanding.

Mr. Davis: Is that counsel's understanding?

Mr. Anderson: No, frankly it is not.

Mr. Davis: With that understanding, we have no objection.

The Court: If counsel has a different opinion than the witness concerning this exhibit I think it should be clarified, there is no use putting in an exhibit here on which there are different understandings between counsel and the witness.

A. What was your question, sir?

The Court: Maybe you can clarify that, Mr. Anderson.

Q. Exhibit No. 33, Mr. Arter, refers to expenses in connection with electrical installation and services to ice crusher and ice dock,—you don't understand that has any relation to the sub-station?

A. Well, it was electrical work as far as I know.

Mr. Anderson: That is right, and that is the purpose of this, to show that the Railroad Company does do some work, electrical work for the Pacific Fruit Express; that is all this is offered for, that is the purpose of it.

Mr. Davis: With that understanding, we [296] have no objection to it.

The Court: It may be admitted.

(Testimony of Harold R. Arter.)

Q. Mr. Arter, I show you Exhibit No. 34 marked for identification, is that the additional bill that you referred to in connection with Exhibit No. 33?

A. Yes, sir.

Mr. Anderson: We offer Defendant's Exhibit No. 34 in evidence.

Mr. Davis: We have no objection.

The Court: It may be admitted.

Mr. Anderson: I take it that I should read these to the jury.

The Court: I suppose that they could be read easier to the jury than handing them to the jury. I think we will take a recess before going into that, Mr. Anderson, and in regard to Exhibits 26, 27, 28, and 29, I find that Exhibits 27 and 29 are not complete without Exhibits 26 and 28. In other words, if I admit the two and there does not seem to be any objection to No. 27 and 29,—they would not be complete without the other exhibits.

Mr. Anderson: That is correct.

The Court: The question confronting the Court is whether a contract, that is any part of this contract should be admitted which are offered, unless they are all admitted in full. As I say, the first two refer to [297] the other two, that is, the two that are not objected to refer to the other two, and to make them a part of the contract seems to be the purpose. I wish counsel would go into this question a little and if you have any authorities that you would like to give the Court to the effect that I can admit them in part without admitting all of

(Testimony of Harold R. Arter.)

them I will be glad to have the authorities and I will do some work on that myself. I admit that this question that I have has not been before me where a part of an instrument is offered without all of it,——

Mr. Anderson: ——I have no authorities but as your Honor has observed in going through these there are a number of things in the contract that have no relation to the issues in this case, there are bound to be such where you have contracts but there are parts that are relevant and it occurred to me that they should not be offered, that is, the parts that are not relevant.

The Court: Well, I will have to study it, as far as I can see now I see no reason for offering it at all for any purpose, any part of it, however, if it is going to be offered in part, I will have to be very careful as to what part is offered and what part is not. It doesn't seem to me that the contract as offered is intelligible, if the jury was to have this now they would not know what it meant because it refers to a portion that [298] would not be in evidence. I wish counsel for both sides would go into this and advise the court as to any authorities they may have. We will recess at this time for 15 minutes.

November 24, 1953, 11:20 o'clock a.m.

Mr. Davis: I call your Honor's attention to the fact that these exhibits are based upon the arrangement or the understanding or the theory that the



(Testimony of Harold R. Arter.)

exhibits that have not been offered in evidence refer to and this witness is being questioned on the theory that the exhibit is before the jury and that would be the only basis for this, that they are operating under this Exhibit No. 26.

The Court: If these are tied in with that exhibit, this matter is going to get rather complicated right soon.

Mr. Anderson: They certainly are, that is,—

The Court: —You don't need to read those to the jury at this time. Do you want to cross examine this witness?

Mr. Davis: I didn't know whether Mr. Anderson was through.

Mr. Anderson: I have another question.

The Court: Very well, you may proceed. [299] Maybe I better look at those right now, it will only take a few minutes.

Mr. Anderson: Exhibit 30, 31, and 32 do relate to the construction contract which is Exhibit No. 26.

The Court: Read the other exhibit then, they are admitted,—these are admitted but in view of the question raised the ruling admitting No. 30, 31 and 32 will be withdrawn and I will rule on it later.

Mr. Anderson: Now, may I read these to the jury?

The Court: Yes, you may go ahead.

Mr. Anderson: Exhibit 33: "Pacific Fruit Express Company, 116 New Montgomery Street, San

(Testimony of Harold R. Arter.)

Francisco 5, California. Form 520, Form 601, Audit No. 86325. Voucher Blank, Bill 38480433 Month's Account 12-48. J. F. Department No. 8732, Date Made January 3, 1949. To Union Pacific Railroad Company Debtor. Make checks payable to Union Pacific Railroad Company and address all remittances to the Assistant Treasurer, Omaha 2, Nebraska. For expenses incurred, your company for electrical installation services to ice crusher and ice dock at Pocatello, Idaho, during the month of October, 1948. Payroll 53-1 and 2 electrical road Gang No. 2 and No. 3. Installation services, 16 hours at \$1.44 per hour, 23.04; 80 hours at 1.39 per hour, 111.20; [300] 96 hours at \$1.16 per hour, 111.36. Total 245.60. Vacation allowance 3% on \$245.60, \$7.37; RRR and UI tax 6.25% on \$252.97, \$15.81; Supervision 10% on \$245.60, \$24.56; Personal expenses, electrical road gang: Voucher E 758544 William R. Bevans, \$27.00; Voucher E 758546 George A. Bailey, \$15.05; Voucher E 756478 Ray Roberts, \$4.10; Voucher E 756486 Wilford G. Averett, \$23.85; Voucher E 754984 Auburn C. Taylor, \$15.10; Voucher E 754988 Clyde W. Casper, \$16.90. Total \$102.00. Form 502-1 Material used December 1948 accounts; 710 pounds No. 6 Triple Braid W. P. Wire at 36 cents a pound, \$255.60. Freight charges, Omaha, Nebraska, to Pocatello, Idaho, 710 pounds at \$1.45 per hundred, \$10.30; Material store expense 6.50 per cent on \$265.90, \$17.28; Superintendence 5 per cent on \$283.18, \$14.16; Federal transportation tax 3 per cent on \$10.30, \$.31. Total

(Testimony of Harold R. Arter.)

\$692.99". Then there is a stamp, in fact several stamps I will read: "Paid journal voucher month of January, 1949". Another: "Add bill notation made on all records affected A21974; 11-49". And that has a signature, "I. S. Briggs." Another stamp "Paid reciprocal agreement debited account, bills payable voucher prior to approval month cleared, January, 1949. Included in settlement for month of January, 1949. For further information address Officer of General and Station Accounts, UPRR Company, Omaha 2, Nebraska."

Mr. Davis: If the Court please, we have [301] no objection to their reading these exhibits but you will notice that they tie into these other agreements and I think it is rather confusing.

Mr. Anderson: I don't see where they tie in at all.

The Court: I sort of agree that they all come under the same heading. It seems to me that the time taken here, this could be fully covered by stipulation between the parties. Of course, counsel have their own theory but I cannot see where any of these exhibits which I have read are material to the issues as they are being presented,—then I am wondering, in view of the fact that these exhibits are admitted, and the jury will have them for their consideration, that is, if they are admitted, if it would save a great deal of time if you would just state what they are and not read them entirely to the jury, I will let you finish reading that one, the Exhibit 34, I believe it is. I believe that I will just

(Testimony of Harold R. Arter.)

let you finish reading those exhibits, Mr. Anderson.

Mr. Anderson: Very well, this is Exhibit No. 34: "Pacific Fruit Express Company, 116 New Montgomery Street, San Francisco 5, California. Bill No. 1775." Then there is a stamped number, "423688 Month's Account October, 1949. J. F. Department No. 6506, Audit No. 21974. Date made, November 7, 1949. To Union Pacific Railroad Company [302] Debtor. Make checks payable to Union Pacific Railroad Company and address all remittances to the Assistant Treasurer, Omaha 2, Nebraska. For expenses incurred in connection with electrical installation service to ice crusher and ice dock at Pocatello, Idaho, in addition to those included in bill collectible J. F. 8732 Audit No. 384804 of January 3, 1949." That is Exhibit No. 33. "Labor: P. R. 53-2 electrical road gang 4-25, 8 hours. 4-26, 8 hours, 4-27, 8 hours, total 24 hours at \$1.51, total 36.24. Supervision,—10 per cent on \$36.24, \$3.62; Vacation allowance,—3 per cent on \$36.24, \$1.09; RRR and UI taxes,—6 per cent on \$37.33, \$2.24; Material,—Form 502-1 No. 404, April, 1949, 1 each CMS-325, Meter base at \$2.55 each, \$2.55; Form 502-1 No. 544 May, 1949, 1 each 3 phase, 25 ampere, 440 volt meter at \$33.10 each, \$33.10, total \$35.65; Freight charges, Omaha, Nebraska, to Pocatello, Idaho, 15 pounds at \$5.12 per hundred, 77 cents; Material store expense,—7½ per cent on \$36.42, total \$2.73; Superintendence,—5 per cent on \$39.15, \$1.96; Federal transportation tax,—3 per cent on 77 cents, two cents, total \$84.32. Paid journal

(Testimony of Harold R. Arter.)

voucher month of November, 1949. Checked by V. M. November 15, 1949. Paid, reciprocal agreement, debited account, bills payable. Vouchered prior to approval, month cleared December, 1949. A and B 1776. Notation made on all records affected. A86325. A91701, [303] I. S. Briggs. Included in settlement for month of November, 1949. For further information address Auditor of General and Station Accounts, UPRR Company, Omaha 2, Nebraska."

The Court: I am going to admit Exhibits 30, 31, and 32. I cannot see any reason for it but I am going to admit them. I am wondering if it is necessary to read every bit of the exhibits to the jury,—I merely ask this in the interest of time.

Mr. Anderson: If it is agreeable with counsel that we may read them at any time and in whole or in part——

The Court: ——I don't imagine that is agreeable with them because they have already objected to the admission of the exhibits.

Mr. Davis: We did not object to the exhibits but I did call attention to the fact that they referred and were more or less connected with the other exhibits. He can read them all or in part as he sees fit, it is a combined proposition between the two to save money.

The Court: The only thing that bothers the Court is if we should get a part of these and not all if it would be confusing. But according to this stipulation or agreement now you can read them all or a part at any time, now or during the argument or

(Testimony of Harold R. Arter.)

later during the trial. They are admitted, however.

Mr. Anderson: I will refrain from reading [304] them now and I will read them later. I think, with the Court's permission I will read a part of them now.

The Court: You go right ahead.

Mr. Anderson: This is Exhibit No. 30: "Form 30. Owner, Pacific Fruit Express Company; operated by Pacific Fruit Express Company. A and B 310, E1775. General Manager's No. A and B 310. Office of Assistant General Manager, San Francisco, January 12, 1952,——"

The Court: I was just thinking of the objection, you say 1952, that is after the date of the accident,——

Mr. Anderson: Did I say '52, I meant to say 1925. "January 12, 1925. Authority for expenditure of \$7608.00 is requested for the purpose of blank to the property as follows: Sub-station location, Pocatello, Idaho. Mile post No., blank, description of project: Construction of power, sub-station and transmission line necessary for taking power under combined load with the Oregon Short Line Railroad Company. Recommendations: The Idaho Power Company were recently granted an increase in power rates, which would result in an increase of about \$2670.00 per year in power cost at Pocatello. It is proposed to combine the power load of PFE with that of the railroad, in which event the PFE would be able to purchase its electric energy at about \$.009 per kilowatt-hour which

(Testimony of Harold R. Arter.)

[305] would result in an estimated saving to us of over \$6,000.00 per year or about 80 per cent of the additional investment. This saving will be further increased on completion of the contemplated car shop facilities with corresponding increase in power consumption. Detail estimate attached is based on estimated figures submitted by the Railroad Company as the work is to be performed by them as they have full equipment for handling this type of work. No provision was made in 1925 budget for this work as the matter was subject of considerable correspondence and was overlooked. This document ratified by Board of Directors. Date 2-21-25 AFE four." Following that is a list of estimated expenses, such as engineering, supervision, electrical lines, sub-station, construction, material and other expenditures. Exhibit No. 31 is an abstract of bills, it says: "Construction of power sub-station and transmission line necessary for taking power under combined load with short line RR Company. A-B-310-Pocatello. Account No. 201 engineering". In red "\$65.00 and in the next column \$65.00. Account No. 215 MSE unapplied construction M & S" in red "\$174.00. Unloading and handling account No. 216-4" in red "\$174.00 and \$96.00. Account No. 208 electric lines" in red figures "\$7,273.00; \$835.00; \$5,943.00; \$94.50; \$400.50." The first three of those figures I read were under the heading sub-station and the last two under the [306] heading power lines. Then follows: "Audit No. 38988 OSL Railroad Company contract \$4298.64,

(Testimony of Harold R. Arter.)

under sub-station \$4004.60, under power line \$294.04. Audit No. 36036 OSL Railroad Company contract \$289.50, under sub-station \$289.50. Audit No. 32024 OSL Railroad Company contract \$43.88, under sub-station \$43.88. Audit No. 41745 OSL Railroad Company contract \$1981.67, under sub-station \$1844.03, under power line \$137.64; Audit No. 44815 OSL Railroad Company contract \$168.37, under sub-station \$168.37, and then in red ink B-C OSL refund on Audit No. 38988 \$350.15; under sub-station \$350.15. Totals February 1, 1926, \$6,431.91, under power lines \$431.68, Audit No. 50617 OSL Railroad Company contract \$55.23, under sub-station \$55.23. Total March 25-26, \$6,487.14, under sub-station \$6,055.46, under power line \$431.68. July, 1926, in red B-C 7-20-26 OSL refund \$14.15, under sub-station \$14.15. Audit No. 63701 OSL Company \$3.13, under sub-station \$3.13." Exhibit No. 32 is entitled Form No. 8837 BV Exhibit C. I will read this in part and it says: "GMO A and B 310-Pocatello. Name of Carrier Pacific Fruit Express Company. Owner Pacific Fruit Express Company. Completion report No. 164. Operating Company Pacific Fruit Express Company. Work performed by Oregon Short Line Railroad Company. Roadway Completion [307] Report. AFE No. 4 date February 21-1925, Sheet No. 1 of one sheet. General account one, road, and general account three, general expenditures. Location of project, State, Idaho. Station, Pocatello. Work begun March, 1925. Project completed Sep-



(Testimony of Harold R. Arter.)

tember 30, 1925; turned over to operation September 30, 1925. Description of project: Construction of power, sub-station and transmission line necessary for taking power under combined load with the Oregon Short Line Railroad Company. Cost borne by Pacific Fruit Express Company 100 per cent. Investment in physical property ice manufacturing plants, Pocatello. Account No. 208 power lines cost \$6044.44 power sub-station; \$431.68 power lines; total \$6476.12."

Q. Mr. Arter, just by way of clarification on Exhibit No. 33 and 34 which I have read, what does the term RRR and UI tax 6.25 per cent, what does that relate to?

A. That is Railroad Retirement and Railroad Unemployment Insurance tax.

Q. Who pays that tax?

A. The carrier who incurs the labor.

Q. Meaning the Pacific Fruit Express?

A. The Union Pacific in this case, performing the labor and incurring the tax and rebilling the Pacific Fruit Express and then allowing it back to the Federal government.

Q. In other words, the charge is made on the basis of the [308] payroll and then they charge you the same as the payroll charges?

A. That is correct.

Q. On Exhibit No. 30, can you tell me what A and B-310 indicate?

A. That is our A and B number so that we can identify it through the documents.

(Testimony of Harold R. Arter.)

Q. As it related to the sub-station?

A. That is it, to identify it with any particular work, we have numerous work orders and work order authorities and we have to number them.

Q. Mr. Arter, can you tell me whether or not the Pacific Fruit Express sub-station and transmission line is carried in the Pacific Fruit Express Capital or investment account?

A. That is correct.

Q. And by capital investment account, what does that mean?

A. Anything that you have invested in fixed improvements.

Q. You mean ownership?

A. Yes, and in fact I may say that the roadway completion report 8837 shows that. That is evidence that it went through the investment account.

Q. And that is Exhibit No. 32?

A. If my memory is right, yes, sir.

Mr. Anderson: That's all. [309]

#### Cross Examination

Q. (By Mr. Davis): Now, Mr. Arter, can you tell me by any chance if the ground, the land upon which this sub-station was erected is carried in the capital account of the Pacific Fruit Express Company?

A. The land, you say?

Q. Yes.

A. I cannot tell without looking at the record.

Q. Well, you have looked up the record to testify here, you looked it up to see, did you not?

(Testimony of Harold R. Arter.)

A. I have testified only about fixed improvements.

Q. Well, do you or don't you know that that land is not carried in the capital account of the Pacific Fruit Express?

A. I can say that I wouldn't know.

Q. And don't you know that it is carried in the capital account of either the Oregon Short Line Railroad or the Union Pacific Railroad Company?

A. It would have to be carried in either one or the other but as far as the PFE is concerned I cannot say until I look at the record.

Q. You came, did you not, to testify as to what, with reference to this property in Pocatello and with reference to this sub-station, as to what property was carried in the capital account and assets of the Pacific Fruit Express, did you [310] not?

A. I have only testified——

The Court: Now, just answer the question, you can answer that.

A. May I have the question again?

(Question read by reporter.)

A. My testimony was as far as fixed improvements were concerned.

Q. Do you know about the real estate?

A. Not unless I looked at the record, we have numerous leases.

Q. Well, do you have the record here?

A. Do you have the record, Mr. Anderson?

The Court: Now, Mr. Witness, you are on the

(Testimony of Harold R. Arter.)

witness stand. However, maybe Mr. Anderson can answer it.

Mr. Anderson: I will say this, that it is on leased property and it would be in the capital account of either one of the Railroad Companies and not of the Pacific Fruit Express Company, that is the land.

Mr. Davis: And that it always has been.

Mr. Anderson: I think that is right.

Q. Mr. Arter, what is your position with the Pacific Fruit Express?

A. Chief Clerk of the Disbursement Department.

Q. How long have you been with the Pacific Fruit Express?

A. I joined the Pacific Fruit Express Company on May 6, 1919. [311]

Q. And these exhibits that you have identified, you are familiar with those, and they are in your custody?

A. That is correct.

Q. Mr. Arter, I refer now to Exhibit No. 30 which has to do with the construction of the power sub-station and transmission line,—you have it in mind what I am talking about?

A. Yes, sir.

Q. If you don't you can ask for the exhibit?

A. Yes, sir.

Q. Now, Mr. Arter, the fact is that as a book-keeping proposition and to save the Pacific Fruit Express Company \$6,000.00 a year the Pacific Fruit Express Company and the Railroad entered into

(Testimony of Harold R. Arter.)

an arrangement to get a combined power rate and operate that line as a combined proposition, didn't they?

A. That is an operating question and I have no jurisdiction over it whatever, I am testifying only as to the accounting records.

Q. Do you want to look at this exhibit again?

A. I know what it is, it is the estimated cost of that project.

Q. And you as Chief Accountant and having been with the company since 1919, can you answer the question that I asked you a moment ago?

Mr. Anderson: I think the exhibit is the [312] best evidence.

The Court: He may answer.

A. You mean about the saving in labor?

Mr. Davis: Is it very difficult to read that question again, Mr. Reporter?

(Question read by reporter.)

Q. Now then, in reefrence to the question just read to you, regardless of jurisdiction, I want to know if it is not a fact that they combined in the operation of that line for the purpose of saving the Pacific Fruit Express Company some \$6,000.00 a year?      A. I cannot answer that.

Q. You can't answer that?      A. No, sir.

The Court: Mr. Davis, may I interrupt a minute?

Mr. Davis: Yes, indeed.

The Court: Am I interfering with anybody's plans if we meet at 1:15 today. I am making a desperate effort to see that some people get a Thanks-

(Testimony of Harold R. Arter.)

giving dinner and if they don't I don't think that it will be my fault. It may be that we will have to hold court on Friday, of course, we will not hold any court on Thanksgiving Day. We will recess at this time, if it is not inconvenient to anybody, until 1:15 this afternoon. [313]

November 24, 1953, 1:15 o'clock p.m.

Q. Mr. Arter, your Exhibit No. 30 that we have discussed, that refers to the construction, by the Oregon Short Line Railroad Company, of a sub-station and certain electrical matters?

A. I don't remember that exhibit,—is that the item of \$692.00?

The Court: Show him the exhibit, Mr. Bailiff.

Q. Mr. Arter, you know from your records and from the exhibits that in 1925 the Oregon Short Line Railroad Company constructed the power and sub-station and the transmission lines for the Pacific Fruit Express Company here at Pocatello?

A. That is correct.

Q. Now, you know also, from your records, that since that time the Union Pacific Railroad Company has taken the place of the Oregon Short Line and it has been carrying on the business with the Union Pacific Railroad Company?

A. Yes, sir.

Q. And you know from your records and files that subsequent to 1925 that the Union Pacific Railroad Company leased property and real estate

(Testimony of Harold R. Arter.)

and the railroad of the Oregon Short Line Railroad Company?      A. That is right. [314]

Q. And has been operating it since that time?

A. That is right.

Q. Now, about carrying of an item for the capital investment account or capital investment purposes, that is a matter of bookkeeping, isn't it?

A. That is right.

Q. Mr. Arter, do you know whether or not the Pacific Fruit Express Company, the people that you work for, initial or stamp their property out in the field with the letters PFE or some other way so it can be shown that it is their property?

A. That is right, it is in our investment record.

Q. Where you own property of that kind it is stamped so it can be shown?

A. Yes, it is stamped to the Pacific Fruit Express account.

Q. Have you ever been to the sub-station out here?      A. No.

Q. Do you know, Mr. Arter, that the sub-station, the picture of which has been shown here, and the frame-work on that not only on November 4, 1950, but all of the time from 1925 when it was constructed bore the stamp of the Oregon Short Line Railroad?      A. No, sir.

Q. Do you know that it doesn't bear the stamp of the PFE at all? [315]

A. I don't know what you mean by that?

Q. You don't know what I mean by that at all?

A. No, there may be some material that is

stamped for transportation purposes or for identification.

Mr. Davis: That's all.

Mr. Anderson: I think that is all.

HENRY C. MEYER

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Anderson): Will you state your name, please?     A. Henry C. Meyer.

Q. And your residence?

A. Omaha, Nebraska, 1310 South 46th Street.

Q. By whom are you employed?

A. The Union Pacific Railroad Company.

Q. How long have you been employed by the Union Pacific Railroad Company?

A. Approximately 40 years.

Q. In what capacity?

A. At the present time valuation engineer.

Q. How long have you engaged in that work or in that capacity?     A. About six years. [316]

Q. Prior to that what did you do?

A. Accountant for the Union Pacific Railroad Company.

Q. What are your duties now,—what did you say your title was or is?

A. Assistant valuation engineer.

Q. As assistant valuation engineer what are your duties?

A. We maintain a record of all of the changes of



(Testimony of Henry C. Meyer.)

the property of the Union Pacific Railroad Company including all its leased lines which are the Oregon Short Line Railroad Company; the Oregon and Washington Railroad and Navigation Company; the Los Angeles and Salt Lake Railroad; the St. Joseph and Grand Island Railroad Company.

Q. Just what do you do with reference to your work, concerning these companies or their accounts?

A. We record all of the property changes, additions and retirements of all of the property of these various lines.

Q. Do you have under your control and under your jurisdiction the records relating to the capital or investment accounts?

A. We do.

Q. What does the capital or investment account mean?

A. It means the property owned by the various lines as I stated before.

Q. Have you, Mr. Meyer, checked your records to determine whether or not the Pacific Fruit Express Company sub-station and the transmission lines connected with it and involved [317] in this case are listed in the capital account records of either the Oregon Short Line Railroad or the Union Pacific Railroad Company?

A. They are not.

Q. Do you know why they are not listed?

A. Well, in investigating this construction of the power sub-station there, I went back to the records and found that back in 1925, what we call our authority for expenditure; I have forgotten the

(Testimony of Henry C. Meyer.)

number but it was in 1925, where we, the Union Pacific or the Oregon Short Line Railroad Company constructed this power station and the lines both from the ice plant to the Batiste Line and it was charged to the Pacific Fruit Express Company. The Oregon Short Line or the Union Pacific constructed it for the Pacific Fruit Express Company which is the owner of the property. We were merely the contractors for the constructing of the station.

Mr. Anderson: I think that is all.

#### Cross Examination

Q. (By Mr. Davis): Mr. Meyer, the Union Pacific Railroad Company does carry as a part of its capital investment certain sub-stations and electrical equipment, for instance, at the Batiste plant?

A. I presume so, I made no investigation of that.

Q. You don't know about that?

A. No, I don't.

Q. You are with the Union Pacific Railroad Company?     A. Yes, sir.

Q. You know that the land on which the sub-station in question is constructed is carried in the capital account or assets of the Union Pacific Railroad?

A. Yes, in the property account of the Oregon Short Line Railroad.

Q. Well, the Oregon Short Line and all of these other companies which you mentioned,—the Union

(Testimony of Henry C. Meyer.)

Pacific Railroad Company is the operating company for these roads?

A. Yes, the Union Pacific Railroad Company leases those lines.

Q. And leased this land? A. Yes, sir.

Q. Have you been out to this sub-station in question here? A. No, I have not.

Q. Do you know that in November of 1950 and prior to that, ever since the same was constructed that the sub-station, the standards and the frame work bore the stamp of the Oregon Short Line Railroad Company? A. I don't know. [319]

\* \* \* \* \*

### HUBERT BRANAM

called as a witness by the defendant, after being first duly sworn, testifies as follows:

#### Direct Examination

Q. (By Mr. Anderson): Will you please state your name? A. Hubert Branam.

Q. Where do you reside?

A. 426 West Benton, Pocatello.

Q. By whom are you employed?

A. Pacific Fruit Express Company.

Q. How long have you been employed by the Pacific Fruit Express Company? [320]

A. About 32 years.

Q. In what capacity?

A. Well, various capacities,—plant manager and at the present time superintendent of refrigeration.

(Testimony of Hubert Branam.)

Q. You have been plant manager of this plant at Pocatello?     A. Yes, sir, I was.

Q. During that time which you mentioned, have you always worked with the Pacific Fruit Express Company?     A. I have.

Q. You never worked for the Union Pacific Railroad Company?     A. Never.

Q. What job did you hold, let us say in 1925?

A. I was made plant manager at that time.

Q. Were you here when the sub-station in question was constructed?

A. It was under construction when I took charge of the plant.

Q. When it was completed can you state whether or not it was turned over to the Pacific Fruit Express Company?

Mr. Davis: I wonder if I may ask this witness a question, your Honor?

The Court: Yes, you may.

Q. (By Mr. Davis): Now, with reference to the turning over of the plant or the construction to the Pacific Fruit Express, was that covered by a written contract and agreement between [321] the Pacific Fruit Express Company and the Oregon Short Line Railroad?

A. I wouldn't know whether there was a written agreement to turn it over.

Q. (By Mr. Davis): Would you know whether it was turned over or constructed under a written agreement?

(Testimony of Hubert Branam.)

A. It was constructed under a written agreement.

Q. (By Mr. Davis): Did the written agreement provide for delivery of the station when it was constructed?

A. I don't know whether it provided for delivery or not.

Mr. Davis: Now, counsel knows whether there was an agreement in writing and if there was a written agreement that would be the best evidence and we object on the ground that this is not the best evidence.

The Court: The objection is sustained until it is shown that there wasn't any written instrument covering this.

Mr. Casterlin: That is one of the exhibits that the Court has not ruled upon, and it was offered for the purpose of showing ownership.

The Court: Then the objection will be sustained as it is covered by a written agreement.

Q. Did you, after construction, accept the property for the Pacific Fruit Express Company?

A. I did. [322]

Q. How long were you plant manager out there, can you tell me?

A. From August 20, 1925, until December,—the end of December, 1943.

Q. Since that time you have been in your present position? A. That is right.

Q. Do you, in your present position, since you

(Testimony of Hubert Branam.)

left the position of plant manager, do you have any supervision over the ice plant out here?

A. I do.

Q. You may state whether or not you are familiar with the sub-station and the other surroundings adjacent thereto?     A. Yes, I am.

Q. Mr. Branam, I show you what has been marked for identification as Defendant's Exhibit No. 35, can you tell me what it is?

A. It is the location of the various buildings about the ice plant, including the sub-station.

Q. And would you say that it is substantially correct?

A. Yes, it is substantially correct.

Mr. Anderson: Now, we offer in evidence Defendant's Exhibit No. 35, it is merely illustrative.

Mr. Davis: We object to this exhibit for the reason that it shows that it was prepared on 11-15-50 at a date when the Court ruled, on their objection, that evidence would not be received in this case, [323] isn't that correct, Mr. Anderson?

Mr. Anderson: That is correct, but I will ask this question.

Q. I will ask you if you know as of November 4, 1950, if what is shown on Exhibit No. 35 is correct?

A. That is right, it has been that way ever since I took charge of the plant.

Mr. Davis: But there isn't any question but what this exhibit was prepared after the accident and prepared as shown on 11-15-50.

Mr. Anderson: That is correct.

(Testimony of Hubert Branam.)

Mr. Davis: We have no objection with that understanding.

The Court: It may be admitted.

Q. I show you what has been marked for identification as Defendant's Exhibit No. 36, can you tell me what that is?

A. That is a diagram of the sub-station, showing the transformers, the lightning arresters and the power line serving the sub-station.

Q. That is not a complete diagram of the sub-station, is it?           A. No.

Q. It illustrates what?

A. The location of the various parts.

Q. The transformers and the rest of the equipment out there? [324]           A. That is right.

Q. Can you say that is correct as of November 4, 1950?

A. Substantially correct, there are no dimensions shown but it is the proper location of the various parts.

Mr. Anderson: We offer Defendant's Exhibit No. 36 in evidence, only for the purpose of illustration.

Mr. Davis: Was this prepared at the time the previous exhibit was prepared?

A. I don't know, I did not prepare them.

Mr. Davis: Who did prepare them?

A. I don't know.

Mr. Davis: Were they prepared by anyone with the Pacific Fruit Express Company?

A. I don't know who prepared them.

(Testimony of Hubert Branam.)

Mr. Davis: You do know that they were prepared by someone with the Union Pacific Railroad Company?

A. No, I don't know. If there is a signature on there I could probably tell who prepared them.

(The following by Mr. Anderson.)

Q. You could tell from the signature?

A. If there is a signature there, I could, yes, sir.

Q. You could tell whether it was prepared by the Pacific Fruit Express Company or by the Union Pacific Railroad Company?

A. Yes, I could.

The Court: Show the exhibit to the witness. [325]

A. It must have been drawn by the Pacific Fruit Express Company, it has their name, the same as our standard drawings.

Mr. Davis: Was it prepared for use as an exhibit?

A. I cannot tell, I don't know.

Mr. Davis: We have no objection to its admission.

The Court: It may be admitted.

Q. All that you have testified about these two exhibits is that the things shown thereon are substantially correct, for the purpose of illustration?

A. That is correct.

Q. On Exhibit No. 35, which was the first one that you identified,—over on the right-hand side it is listed sub-station A; there is a line running northwesterly over to what is termed sub-station B, what does that line represent?



(Testimony of Hubert Branam.)

Mr. Davis: Now, we object to this as incompetent, irrelevant and immaterial, the exhibit is the best evidence. This man didn't prepare it, he just introduced this exhibit for an illustration of the general plan.

Mr. Anderson: If he knows, he can tell.

The Court: That would be rather unusual to have a man testify to an instrument that was not prepared by him.

Mr. Anderson: Well, if he knows, that's all [326] I am asking him.

The Court: I don't think it is very serious, I will let him answer.

A. May I see the print again?

The Court: Hand the exhibit to the witness.

A. This is the line that furnishes power for the ice plant proper.

Q. From the sub-station?

A. This is the 2300 volt side.

Q. There is another line running to the top of the map from the sub-station, can you tell me what line that is?

A. That is the 12,500 volt line leading to the sub-station.

Q. From where?

A. From the Union Pacific Line which is known as the Batiste Springs line.

Q. What is the fact about whether that line extends over the railroad from the sub-station to the Batiste line?

(Testimony of Hubert Branam.)

A. It extends over the ice platform and the tracks.

Q. Where is the connection with the Batiste or the Union Pacific power line that feeds the sub-station?

Mr. Davis: Is he testifying from the exhibit now?

Mr. Anderson: No, if he knows it.

Q. Let me put it this way, where does the railroad company deliver power which goes into the sub-station? [327]

A. They deliver from that Batiste line that runs north and south.

Q. Across the tracks?

A. There are either two or three tracks between the icing platform and this power line, parallel to the platform.

Q. Does that line that we have just mentioned serve any railroad facilities at all?

A. Which one, the one leading to our sub-station?

Q. From the Batiste line, yes.

A. No, sir.

Q. That merely feeds the sub-station?

A. That is right.

Mr. Anderson: May we hand these exhibits to the jury?

The Court: You may hand them to the jury.

Q. Mr. Branam, state what the fact is as to whether or not there is a switch over on the pole on this railroad to Batiste line, where the line to

(Testimony of Hubert Branam.)

the Pacific Fruit Express Company sub-station takes off?

A. There are disconnect switches, yes, sir.

Q. Have you had some experience as an electrician?      A. Some, yes.

Q. What experience have you had?

A. Well, I started out in a power plant, operating electrical equipment and I served an apprenticeship with the Allis-Chalmers [328] Company handling electrical equipment and operated various PFE Company electrical plants.

Q. While you were plant manager here in Pocatello did you perform some of the electrical work or most of the electrical work that might have been needed around the Pacific Fruit Express Company plant?      A. Yes, sir.

Q. Would you say that you performed part of it or all of it?      A. Part of it.

Q. Now, the sub-station in question here, what is the fact as to whether or not, since the construction and up to November 4, 1950, has it been operating satisfactorily as a sub-station?

A. It has.

Q. Until the injury of LaVerl Johnson, November 4, 1950, had you had any difficulty whatever at that plant with injuries or anything of that sort?      A. No injuries.

Q. I don't know whether you know this or not, —I will ask you if there is any sign on this sub-station that indicates whether it is a General Electric or a Western Electric?

(Testimony of Hubert Branam.)

A. There is a sign on each side that says "General Electric outdoor substation" or words to that effect.

Q. Do you know what that means?

A. I would say that is the manufacturer of the product.

Q. When this plant was constructed,—first, let me ask you [329] this,—there is a meter at the sub-station, inside of the cage?

A. That is correct.

Q. Can you tell me who hooked up that meter after the sub-station was constructed?

A. A representative of the Idaho Power Company.

Q. What are the dimensions of the sub-station, that is about,—approximately?

A. Approximately 30 by 30 feet.

Q. Is there any fence around it?

A. There is.

Q. Is there a gate?                    A. There is.

Q. Is there a lock for that gate?

A. Yes, sir.

Q. Do you know who has the key to that lock on the gate?

A. The plant manager of the Pacific Fruit Express Company.

Q. And who would that be now?

A. Mr. Shoup.

Q. When you were plant manager did you have the keys?                    A. I did.

(Testimony of Hubert Branam.)

Q. How many were there then or how many are there now?

A. There were two then,—I cannot say how many now. When I operated the plant there were two keys.

The Court: Counsel know what they are [330] doing, because counsel are very able on both sides but let me ask, don't you think that we have spent enough time on the size of this station and the fact the gate was locked and so on. All of this testimony up to this time has been to the effect that it is fenced, that there is a key, that the gate was locked, that the key was kept by a man at the Pacific Fruit Express Company plant. I think it is about time to stop this repetition.

Mr. Anderson: I think the Court is right.

The Court: I want you to understand though that I am not trying to stop you on any particular line of testimony, I am simply trying to save some time.

Mr. Anderson: I think the Court is right but it seemed the normal situation to just bring this up-to-date through this witness.

The Court: Don't let me stop you, Mr. Anderson, I have been thinking that I would like to get through this case this week and sometimes I get in a hurry and may be a little bit impatient.

Mr. Anderson: I think the Court is absolutely right on this matter.

The Court: You may go ahead with your examination.

(Testimony of Hubert Branam.)

Q. In this sub-station, Mr. Branam, are there and were there disconnect switches to the lightning arresters? [331]     A. There were.

Q. And could they be pulled by someone there at the Pacific Fruit Express plant when it was necessary?     A. Yes, sir.

Q. Was there a hot-stick available to do that?

A. Yes, sir.

Q. Do you know where the hot-stick was kept?

A. In the engine room.

Q. How far away from the sub-station was that?

A. Perhaps 150 feet, I don't know exactly.

Q. Do you know why it was kept there rather than at the sub-station?

A. To keep it dry, otherwise it would have no protection.

Q. Do you know whether or not on that switch over on the Batiste line, where the line,—the Pacific Fruit Express Company line comes to the sub-station, is there more than one switch over there?

A. Yes, a switch on each phase, that would make three switches.

Q. On three wires?

A. Yes, three wires and three disconnect switches, one on each wire.

Q. And if all of them were pulled, what effect would that have on the power in the sub-station?

A. There would be no power in the sub-station.

Q. In the transformers or the lightning arresters either? [332]     A. No, sir, none.

(Testimony of Hubert Branam.)

Q. Do you know who has control or owns those three switches on the pole?

\* \* \* \* \*

The Court: Who do they belong to?

A. The Union Pacific. [333]

\* \* \* \* \*

### Cross Examination

Q. (By Mr. Davis): You are sure that last answer is correct? A. Yes, sir.

Q. Those switches belong to the Union Pacific?

A. That is right.

Q. Do you understand that you are qualified here as an expert? A. I didn't say so.

Q. I didn't mean it that way, do you consider yourself as an expert electrician?

A. No, not an expert.

Q. Now, the sub-station was in such condition that if the hot-stick was kept there it would not have remained dry?

A. Out in the sub-station it would not, rain would get on it and snow would get on it and it would have become unsafe to use.

Q. Couldn't you have fixed it so that it could have been there and kept dry?

A. If you want to build a house around it, yes.

Q. About how large is that,—oh, I guess everybody knows that,—did you say that you would have to build a house around it?

A. Well, something would have to be built to protect it.

(Testimony of Hubert Branam.)

Q. Would not a metal container do that, one just a little larger than the stick? [334]

A. Perhaps.

Q. Are you an officer of the Pacific Fruit Express Company now?

A. I don't know what you mean by an officer, I am not an executive officer but I am operating it.

Q. You do have an official capacity?

A. Yes.

Q. You are superintendent?

A. That is right.

Q. And you know that the Pacific Fruit Express Company have an important financial interest in this suit?

\* \* \* \* \*

A. I was under the impression that the Union Pacific was being sued.

Q. Do you know or don't you know whether the Pacific Fruit Express Company has an important financial interest in this case?

A. No, I don't know that.

Q. You don't understand, that is, you don't say that they do or you don't say that they don't? [335]

A. That is right.

Q. Now, you know, do you not, that the Oregon Short Line Railroad Company under the original construction agreement that you say you accepted this sub-station and plant from them, you know that they agreed in there, with your company to inspect that meter, do you know that or do you not?

Mr. Casterlin: That is objected to on the ground



(Testimony of Hubert Branam.)

that it is now indicated that this is covered by a written contract and that is the best evidence, and it is not in evidence as yet.

The Court: Is that covered by this contract?

Mr. Casterlin: Yes, it is.

The Court: During the noon hour you gentlemen were to furnish me with some authority, I haven't had much help on that but I have decided myself that a book or document offered in evidence must be considered in its entirety; parts operating against the party offering it as well as parts in its favor. Accordingly, when part of the document is offered by one party then the other party is entitled to put in the remainder. I realize that in this contract there possibly are parts which are not material, but it would be very confusing to the jury, and it would be wondering what those parts were, and I feel that the rule is in introducing this instrument for any [336] particular purpose, although it is introduced to prove some particular fact or for some particular purpose, it becomes substantive evidence in the case and may be used by the adverse party for other purposes. So that we can get away from this question and not have it confronting us during the remainder of this trial, I am going to admit Exhibits 26, 27, 28 and 29 and counsel then read, at the proper time, any portion they desire to the jury, and then counsel for the plaintiff will be entitled to read any portion of the document that is not read by counsel for the defendant. They are now in evidence.

(Testimony of Hubert Branam.)

Q. Now then, the last question becomes unnecessary and I will ask you, Mr. Branam, where were you on November 4, 1950?     A. At my home.

Q. You were not at the plant that day?

A. No, sir.

Mr. Davis: That is all.

### Redirect Examination

By Mr. Anderson

Mr. Anderson: Perhaps I should have asked this on direct examination.

Q. On some of the steel framework on the substation, Mr. Branam, are there any names stenciled on there besides General Electric?

Mr. Davis: I object to this unless it is [337] shown as of November 4, 1950.

Mr. Anderson: That is right, that should have been included in my question, as of November 4.

A. Yes, sir, there is stenciling on the steelworks.

Q. What was that stenciling?

A. Oregon Short Line Railroad Company, Pocatello, Idaho.

Q. Is there a date on there too?

A. Yes, sir.

Q. Do you remember what that date is?

A. I believe it is 5-15-25.

Q. Do you know what that is on there for?

A. That is the shipping instructions and was the address for the material to be shipped to.

Mr. Anderson: That is all.

(Testimony of Hubert Branam.)

Recross Examination

Q. (By Mr. Davis): That is your conclusion,—that is just what you think, isn't it?

A. I don't know why I should think anything else.

Q. But you didn't work for the Oregon Short Line Railroad Company at that time or any other time, did you? A. No, sir.

Q. There isn't any place on that structure where Pacific Fruit Express Company is stamped, is there? [338] A. No, sir.

Mr. Davis: That is all.

Redirect Examination

Q. (By Mr. Anderson): Who were the contractors that built that sub-station?

A. The Oregon Short Line Railroad Company.

Q. Did the Oregon Short Line Railroad Company provide the material? A. Yes, sir.

Q. Do you know that it was actually shipped to the Oregon Short Line Railroad Company?

A. It would have had to have been.

Mr. Anderson: That is all.

Mr. Davis: Yes, that is all.

HAROLD A. SHOUP

being called as a witness by the defendant, having been first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Anderson): Will you state your name, please? A. Harold A. Shoup.

(Testimony of Harold A. Shoup.)

Q. And you have previously testified in this case?     A. Yes.

Q. You are the plant manager of the Pacific Fruit Express [339] Company at Pocatello, are you?     A. That is right.

Q. And you were on November 4, 1950?

A. Yes, sir.

Q. When did you first become plant manager at Pocatello?     A. September 1, 1949.

Q. Were you here on November 4, 1950?

A. No, I was not.

Q. Tell me, Mr. Shoup, if you do require any electrical service at the PFE ice plant?

A. Yes, there have been times that we have had to have electrical work done.

Q. How do you obtain that work?

A. We obtain it by employees,—linemen of the Union Pacific.

Q. Do you call them?     A. Yes, sir.

Q. Has that been frequently or otherwise?

A. I think it has been done over a number of years that the PFE has been operating there.

Q. Do you know whether they were called during the years 1949 and 1950?

A. I don't know that, I never called them in 1950.

Q. You hadn't called them?     A. No, sir.

Q. You had no work for them in 1950? [340]

A. Not that I know of.

Q. Now, what about 1949?

A. I don't know about that.

(Testimony of Harold A. Shoup.)

Q. You came here what time?

A. September 1, 1949.

Q. From September on, from September 1st on did you call them that year for any work?

A. I don't recall ever calling them.

Q. When they do any work, do you instruct them what you want them to do?

A. That is right.

Q. And they do what is necessary and then leave?      A. That is right.

Q. On November 4, 1950, how many keys were there to the sub-station?      A. Two.

Q. Who had possession of them?

A. I had possession of them.

Q. Did the railroad have a key to the sub-station?      A. No, they have not.

Q. Men from the railroad come out there once a month to read the meter?      A. Yes, sir.

Q. And do you let him in to the sub-station?

A. I or my assistant, yes. [341]

Q. And when those bills are presented, do you approve them?      A. Yes.

Q. They come in monthly, do they?

A. Yes.

Q. And you approve them and then what do you do with them?

A. I forward them to San Francisco.

Q. Do you know of any time since you have been out there that any electrician from the railroad has been there and changed the transformer oil in any of the transformers?

(Testimony of Harold A. Shoup.)

A. No, they have not.

Q. Who does that work?

A. We do that ourselves.

Q. At the time,—on or about November 4, 1950, did you have a man working for you that did some electrical work?

A. What was that question again?

Mr. Anderson: Will you read it, Mr. Reporter?

(Question read by reporter.)

A. No, I don't think so.

Q. Since you have been out there, from the time you came up until November 4, 1950, can you tell me what the fact is as to who operated the sub-station?

A. You say who operated the sub-station?

Q. Yes.

A. The Pacific Fruit Express Company. [342]

Q. Out at the Pacific Fruit Express Company plant there, and in your business as manager, do you make any reports at all to the Railroad Company of the activities of the Pacific Fruit Express Company?     A. No, sir, we do not.

Q. Do any of the railroad officials or employees instruct you in your work out there?

A. No, sir.

Q. Who do you take orders from?

A. I take orders from Mr. Branam who is the superintendent and from Mr. L. Edzelson, the general superintendent of refrigeration, and Mr. K. D. Plummer, Vice President and General Manager of the PFE.

(Testimony of Harold A. Shoup.)

Q. Do any of those gentlemen work for the railroad? A. No, sir.

Q. Mr. Branam, that is the gentleman who just testified ahead of you? A. Yes, sir.

Q. I asked Mr. Branam this, but let me ask you too,—is there a so-called hot-stick that you have in your possession to pull the disconnect switches in the sub-station? A. Yes, there is.

Q. Where do you keep it?

A. In the engine room up next to the radiators.

Q. Why do you do that? [343]

A. To keep it dry so that it won't collect moisture.

Q. And that is used for what purpose?

A. For pulling the disconnects with high voltage.

Q. Is that a laminated stick, or do you know?

A. No, that is treated wood but I am sure it is not laminated.

Q. Do you know who, at your plant, has authority to use that stick to pull those disconnect switches?

A. Myself and my assistant or we might designate a shift engineer to pull the disconnects, but we generally take the responsibility to do that ourselves.

Q. On November 4, 1950, Mr. H. O., Johnson was your assistant? A. Yes, sir.

Q. And he is since deceased?

A. That is right.

Q. Has anybody from the railroad company ever come over there and operated that station?

(Testimony of Harold A. Shoup.)

A. No, sir.

Q. Have any of them ever come over and pulled the disconnect switches? A. No, sir.

Q. By disconnect switches I mean the ones that go to the lightning arresters, is that correct?

A. That is right.

Q. They have not pulled any of them?

A. No, sir. [344]

Q. In the sub-station itself, in addition to these disconnect switches there is a pole-top switch that does disconnect the transformers, is that correct?

A. Yes.

Q. When the disconnects for the lightning arresters and the pole-top switch is pulled, that is the disconnects and the pole-top switch, does that de-energize all the electrical power in that sub-station?

A. The pole-top switch only de-energizes to the transformers.

Q. But that and the disconnect switches to the lightning arresters, do they de-energize all of the power in the sub-station? A. That is right.

Mr. Anderson: I think that is all.

#### Cross Examination

Q. (By Mr. Davis): Mr. Shoup, I have your testimony or notes on your testimony that when the Union Pacific electricians came out there that you instructed them what to do?

A. We told them what we wanted done,—they



(Testimony of Harold A. Shoup.)

have a foreman there, we just tell them the work that we want done.

Q. And then after you tell them the work that you want done their foreman does the instructing, is that right? A. I would say yes.

Q. Did you ever tell them anything to do? [345]

A. Well, I have told them what we wanted done, I don't think that I ever instructed them as to what to do.

Q. I thought you said, Mr. Shoup, that you didn't ever recall, or that you said that you never called them yourself?

A. I have called them, certainly.

Q. Well, we must be mistaken. I thought that you testified that you had no recollection of calling them, and that you never called anyone from the Union Pacific?

A. We have to call them, how would we get the work done if we didn't call them.

Q. Did you ever call them in 1949?

A. No, sir.

Q. Did you ever call them in 1950?

A. Not that I have any recollection of.

Q. When was it that you called them, that you told them what you wanted done?

A. I think the first time to have any work done was in 1952, I think I stated at that time——

Mr. Casterlin: Not any description of what he had them do, we have no objection as to when he called them or the fact that he did call them, but

(Testimony of Harold A. Shoup.)

a description of what he had them do we object to that.

The Court: Yes, anything that was done by the electricians in connection with that plant after [346] 1950,—after the date of the accident, that would be objectionable.

Q. When you testified that you never called them in 1949 or in 1950, you didn't mean that there was never anyone from the Union Pacific electrical department out there in 1949 or 1950?

A. Not that I have any recollection of.

Q. Other people could call them?

A. I am sure that they would not be doing any work without supervision of the Pacific Fruit Express Company.

Q. I want to know, if you are in a position to say and if you do say that there wasn't anyone from the Union Pacific electrical department out there at that sub-station during 1949?

A. I don't know that.

Q. And you don't know as to 1950?

A. No, sir.

Q. Mr. Shoup, did you yourself ever use that hot-stick?

A. Yes, I had occasion to use it.

Q. What did you use it for?

A. We pulled the disconnect on the secondary bank adjacent to the building.

Q. In this sub-station?                      A. No, sir.

Q. You never did use it in this sub-station?

A. No, sir.

(Testimony of Harold A. Shoup.)

Q. And you never saw it used in this sub-station?

A. Only to pull the pole-top disconnect.

Q. You didn't know until after the accident, after November 4, 1950, that that pole-top switch didn't disconnect all of the power, both in the transformers and the lightning arresters in that sub-station, did you?

A. I think I made that statement, yes.

Q. You know that is in your deposition?

A. Yes.

Q. And you didn't know that until that time?

A. No, sir.

Q. And you thought that when that pole-top switch was pulled that it cut out every bit of electrical current that went into that sub-station, didn't you?

A. Yes, sir.

Q. Now, Mr. Shoup, when you talk about operating it, you operate it as far as the sub-station and the meter reading is concerned, under a written agreement which you have between the Pacific Fruit Express Company and the Railroad Company?

A. That is right.

Mr. Davis: That is all. [348]

### Redirect Examination

Q. (By Mr. Anderson): Counsel asked if you called anyone, any railroad electrician in 1949 or 1950, in other words, he asked if they were out there, I didn't quite get your answer but if there were any out there at all, did you call them?

(Testimony of Harold A. Shoup.)

A. Well, I would say that if they were out there certainly we would have to call them before they came out there.

Mr. Anderson: That's all.

### Recross Examination

Q. (By Mr. Davis): Did I understand you to say you didn't have any electricians on the payroll of the Pacific Fruit Express Company at this plant in November of 1950?     A. That is right.

Mr. Davis: That is all.

Mr. Anderson: That is all, thank you.

### JAMES E. JOHNSON

called as a witness by the defendant, after being first duly sworn, testifies as follows:

### Direct Examination

Q. (By Mr. Anderson): Will you please state your name?     A. James E. Johnson. [349]

Q. And where do you reside?

A. 1122 North Hays, Pocatello, Idaho.

Q. By whom are you employed?

A. The Pacific Fruit Express Company.

Q. Here in Pocatello?     A. Yes, sir.

Q. What department do you work in?

A. I am a stationary engineer.

Q. In the ice plant?     A. Yes.

Q. Are there other departments out there beside the ice plant?

A. Mr. Gibson has a repair shop.

(Testimony of James E. Johnson.)

Q. Is that the car shop? A. Yes.

Q. Is there a store department?

A. Certainly.

Q. And you work in the ice plant, you say?

A. Yes, I work in the ice plant.

Q. How long have you worked for the Pacific Fruit Express? A. Since 1924, for 29 years.

Q. And what is your title?

A. Shift engineer.

Q. Were you the shift engineer on November 4, 1950? A. Yes, sir.

Q. Will you state briefly what are your duties as shift engineer? [350]

A. Well, maintenance of electrical equipment and machinery in general. Operating the ice plant.

Q. Do you have electrical equipment to operate the ice plant with? A. Yes.

Q. I suppose that you know where the sub-station is where LaVerl Johnson was injured?

A. Yes, sir.

Q. You know about that, do you?

A. Yes, sir.

Q. Were you working out there on November 4, 1950? A. Yes, sir.

Q. Do you know what you did in the morning out there, right after you came to work?

A. No, not right after I came to work, I know what we intended to do but I don't know what I was doing right after I came to work.

Q. I see, what time do you go to work?

A. Eight o'clock. There are times that they need

(Testimony of James E. Johnson.)

ice and we didn't start on that particular job that we were to do that day.

Q. After you came to work what did you do out there that day?

A. We were inspecting the transformer oil and taking samples from them.

Q. Was that shortly after you came to work that you started to [351] do that?

A. I would say within a couple of hours.

Q. What did you first do with reference to the inspection of oil in the transformers?

A. We had to unlock the gate.

Q. Did you first go to the sub-station, is that it?

A. Yes.

Q. And who unlocked the gate?

A. Howard Johnson or myself.

Q. Who else was with you?

A. Mr. Judge, Pacific Fruit Express Company electrician, and——

Q. Howard Johnson and yourself and Mr. Judge, is that right?     A. Yes.

Q. What did you do when you got into the sub-station?

A. We have two oil switches that we pulled first and then break the breaker on top of the tower.

Q. The switch that de-energizes the transformer, is that it?

A. Yes, that de-energizes the transformer, that is right.

Q. After you did that,—first let me ask, do you know who pulled that pole-top switch?

(Testimony of James E. Johnson.)

A. I am not positive but I think that I did myself, I was in the habit of doing that when we went in.

Q. And after you pulled that and these two oil switches what did you do?

A. Started to work on the transformers. [352]

Q. You say that you were inspecting the oil?

A. Yes.

Q. What do you do when you are inspecting the oil?

A. Raise the lids and look down at the oil and add oil if need be.

Q. The lid is on top of the transformer?

A. Yes, sir.

Q. How many transformers are in that cage?

A. Three large and two small ones.

Q. What did you do when you got through inspecting the oil in the transformers, did you leave the cage?

A. We locked the cage up and left it.

Q. When you inspected the oil in the transformers there, was there anyone else there with you at that time besides you three, Howard Johnson, Mr. Judge and yourself?

A. Yes.

Q. There were others there?

A. Yes, sir.

Q. Who were they?

A. PFE laborers cleaning the weeds out.

Q. Were there any railroad electricians in there?

A. No, sir.

(Testimony of James E. Johnson.)

Q. Was there anyone from the railroad at all that you saw there?

A. I never saw any there.

Q. At the time you pulled the pole-top switch to de-energize the [353] transformers, did you pull the disconnect switch to de-energize the lightning arresters?     A. No, sir.

Q. Did you leave the transformer cage before the men got through cutting weeds?

A. No, sir.

Q. You and Mr. Judge and Mr. H. O. Johnson were the last ones out?     A. Yes, sir.

Q. Was the gate locked when you went out?

A. Yes, sir.

Q. Were you over around that sub-station the rest of that day?

A. Yes, I was there again.

Q. When was that?

A. When we put the disconnect in after the accident.

Q. When you did what, I didn't get that?

A. When we put the main switches in after the accident.

Q. You mean when you connected up the pole-top switch?     A. Yes, sir, energized it.

Q. Had you completed your oil investigation or your inspection of the transformer oil then?

A. Yes, sir.

Q. And you had not been over around there prior to that time except in the morning as you testified to?     A. No, sir. [354]



(Testimony of James E. Johnson.)

Mr. Anderson: You may cross examine.

Cross Examination

Q. (By Mr. Davis): Are you an electrician, Mr. Johnson? A. No, sir.

Q. Have you ever seen Union Pacific electricians out at the plant there? A. Yes, sir.

Q. Did you ever consult with them concerning your electrical equipment in the plant?

A. Oh, certainly.

Q. Those were the only people that you had to consult with, were they not?

A. Mr. Branam told us what to do.

Q. Who did? A. Mr. Branam.

Q. He told you what to do? A. Yes.

Q. When you wanted to know something about electricity or had an electrician's problem at the plant you consulted with the Union Pacific men, didn't you? A. No, sir.

Q. I thought you said that you did?

A. We talked about it but I never asked about any trouble that [355] I ever had.

Q. You never did? A. No, sir.

Q. Do you know any of the Union Pacific electricians? A. Yes, sir.

Q. Which ones do you know?

A. I know Mr. Fetchel.

Q. Anyone else?

A. Well, I know the boys that were coming out there but I don't know their names.

Q. Didn't the boys that came out there,—you

(Testimony of James E. Johnson.)

say that you know who they were but didn't know their names?     A. Yes, sir.

Q. Did you know Mr. Eskilson, the foreman who read the meters?     A. Yes, sir.

Q. And those Union Pacific employees, whether you knew their names or not, they knew that you were checking the transformer oil, that you did that?

A. I couldn't tell you that, they knew that we were taking care of it but I don't know how the reports went in or anything like that.

Q. But they knew that you people took care of the checking of the oil yourselves?

A. I presume they did, yes, sir.

Mr. Davis: That's all. [356]

Mr. Anderson: That's all.

### MELVIN JUDGE

called as a witness by the defendant, after being first duly sworn, testifies as follows:

#### Direct Examination

Q. (By Mr. Anderson): Will you please state your name?     A. Melvin Judge.

Q. Where do you reside?

A. Pingree, Idaho.

Q. What is your business or occupation?

A. Electrician.

Q. Where do you work now?

A. I am working at the AEC project for the Cache Valley Electric.

(Testimony of Melvin Judge.)

Q. Over near Arco? A. Yes, sir.

Q. How long have you been working for them?

A. I have been working about two weeks now, for them.

Q. What kind of work are you doing?

A. Inside wiring, electrical maintenance work.

Q. How long have you been engaged in electrical work?

A. I have worked at it for close to 20 years now.

Q. Have you ever done any work on high voltage electricity?

A. Yes, I worked for the Idaho Power Company in Salmon and [357] I worked for the Pacific Fruit Express on maintenance at the new car plant they built there.

Q. You mean here in Pocatello?

A. Yes, sir.

Q. About when did you go to work for the PFE?

A. I went to work for them the last of September, the year of the accident.

Q. September of 1950? A. Yes, sir.

Q. On November 4, 1950, did you have occasion to go into this sub-station at the Pacific Fruit Express plant?

A. Yes, I went in the sub-station because I had checked the oil on the transformers in the new PFE place and so we worked together on all of them.

Q. What time of the day did you go to the sub-station?

(Testimony of Melvin Judge.)

A. I went to work at eight o'clock in the morning and I went to the ice plant, we had to find the bottles to get the samples of the oil and then went to work on the sub-station soon after that.

Q. Did you go into the sub-station that morning?  
A. Yes, sir.

Q. Who did you go in with?

A. James Johnson, Howard Johnson, and those laborers went in.

Q. James Johnson who just testified?

A. Yes, sir. [358]

Q. Who let you into the sub-station?

A. It was James or Howard Johnson, I don't recall which one unlocked the gate.

Q. One of them unlocked the gate?

A. Yes, sir.

Q. After you got in, what did you do?

A. Well, I checked there while they made sure they disconnected the switches,—that was the ice plant's work and they disconnected or pulled the two oil switches and then the air break switch on top that killed all of the power except what went to the lightning arresters.

Q. Was your work that day in connection with transformers?  
A. Yes, sir.

Q. And when that top pole switch was pulled at the sub-station, did it de-energize the rest of the transformers throughout the PFE system out there?

A. Yes, sir.

Q. Were you checking all of the transformers that day?

(Testimony of Melvin Judge.)

A. Yes, taking samples of the oil and checking all of them.

Q. At the time that you were in this transformer station or sub-station that morning, after the switches were pulled, you were checking the transformers, were there any railroad laborers or employees in there or anybody for the railroad?

A. No, sir. [359]

Q. Just the three of you?

A. Yes, and the laborers that were cutting weeds in the sub-station.

Q. Did they leave before you did, I mean the laborers?

A. Yes, they went out before we did.

Q. Were you ever back over around the sub-station after that, that day?      A. No, sir.

Q. Your work took you somewhere else?

A. Yes, we finished on the transformers over in the car shop and so, I had my car over there and James Nelson went back and turned the power on and I went home from there.

Q. At that time did you hold a state license as an electrician?      A. Yes, sir.

Q. State whether or not this was the first time that you had ever been in that sub-station?

A. Yes, it was the first time.

Mr. Anderson: I think that is all.

#### Cross Examination

Q. (By Mr. Davis): What kind of car did you have?      A. I have a Ford '49.

(Testimony of Melvin Judge.)

Q. You didn't have any printing or name on the side of it?     A. No, sir.

Q. Now, as I understand it, when you were there, there were [360] no Union Pacific electricians there?     A. No, sir.

Q. You don't know whether there were any in there any other time that day?     A. No, sir.

Q. The checking of the oil of the transformers with 12,500 volts of electricity, that is work and a job for an electrician, work that an electrician should do?     A. Yes.

Q. And that is no job for a layman?

A. No, it should be done by an electrician.

Q. Did you know when you were in there that there was energy in these lightning arresters after the top switch was pulled?     A. Yes, sir.

Q. You knew that?     A. Yes, sir.

Q. And you saw laborers working in there, cutting weeds?

A. Yes,—they were warned that the power was still on the lightning arresters at that time.

Q. Of the people that were in there, who warned them that the power was in the lightning arresters?

A. James Johnson.

Q. Mr. James Johnson and Howard Johnson both knew that the power was in the arresters?

A. Yes, sir.

Q. Did you ever go there with Mr. Shoup?

A. No, sir.

Q. You never did?     A. No, sir.

(Testimony of Melvin Judge.)

Q. This was the only time that you were in there?

A. Later on that day but not before.

Q. Not before November 4, 1950?

A. No, sir.

Q. When you went out of there was that left disconnected or was it put back in position?

A. It was left disconnected and the gate locked.

Q. Do you know how long it was left disconnected that day and the pole-top switch pulled?

A. It was left disconnected until we finished checking the oil in the transformers and then James Johnson went over, after we finished and turned the power on. At that time I left to go home.

Q. Now, the power was turned on before you left the plant?

A. No, sir, he went to turn it on as I left.

Q. He went over to turn it on?

A. Yes.

Q. Now, let's get that straight, Mr. Judge, what time did you leave?

A. I cannot recall just now but it was towards the end of the [362] day, I cannot say the exact time.

Q. What time did you first go in there?

A. I started to work at eight o'clock and I went to the ice plant to hunt these bottles that they kept the oil samples in, after we found them we went into the sub-station,—I never checked the time.

(Testimony of Melvin Judge.)

Q. Would it be nine o'clock, or tell me what is your best estimate?

A. Somewhere around nine o'clock.

Q. How long were you in there?

A. We was in there, I would guess possibly an hour or an hour and a half.

Q. And then you went out, the gate was locked and the switch was left pulled?

A. Yes, sir.

Q. And then what did you do, did you go to lunch?

A. No, checked the transformer at the ice plant, in the small transformer vault outside of the ice plant, and we finished that about noon.

Q. Then what did you do?

A. In the afternoon we went to check the transformer on the PFE car plant.

Q. When you came back in the afternoon was the energy still off?

A. I never went to the station but we figured that it would [363] be because we locked the gate and the keys were turned over to the ice plant.

Q. You figured and it was generally understood that the power would be off while you were making this inspection that day?     A. Yes, sir.

Q. You don't know whether it stayed off all day, but you think that it did?     A. Yes, sir.

Q. When did you see James Johnson go back to turn the power on?

A. James Johnson went back that evening after we finished with the transformers. His car was at



(Testimony of Melvin Judge.)

the ice plant and he went to turn it on, I had my car over by the car shop and so I went on from there.

Q. That was after this accident?

A. Yes, sir.

Q. Where were you at the time LaVerl Johnson got hurt?

A. I was on top of a pole by the office at the PFE plant, they had one old transformer there and the oil was bad in it, we were draining the oil and they didn't have enough oil to fill it so Charlie Gibson came out and Howard Johnson and Mr. Gibson went to the Idaho Power to get oil to finish filling the transformer. They were gone quite a long time and when they came back they said about Mr. Johnson getting burned over there at the station. [364]

Q. As an electrician, you felt that it was safe for those laborers to be in the enclosure there with energy in the lightning arresters?

A. No, sir, I didn't figure that it was safe.

Mr. Davis: That's all.

#### Redirect Examination

Q. (By Mr. Anderson): Did you say that these laborers were instructed?

A. Yes, they were instructed that the power was in the lightning arresters.

Q. Did any of them get hurt?

A. No, sir.

Mr. Anderson: That's all.

Mr. Davis: That is all.

Mr. Anderson: At this time, if the Court please, I think I would like to read these contracts.

The Court: You may do so.

Mr. Anderson: They are Exhibits 26, 27, 28 and 29. Exhibit No. 26 reads: "ACE 6085; Audit No. 13133" and in pencil: "1775E.

"This agreement, made and entered into this first day of March, 1924, by and between the Oregon Short Line Railroad Company, a corporation of the State of Utah, hereinafter called Railroad Company, party of the first part, and the Pacific Fruit Express Company, a corporation [365] of the State of Utah, hereinafter called Pacific Company, party of the second part, Witnesseth:

"That whereas, in the operation of its railroad, the Railroad Company owns and operates extensive shop and terminal facilities at Pocatello, Idaho, and purchases electric power from the Idaho Power Company for use in connection with the operation of said facilities; and,

"Whereas, the Pacific Company is handling the refrigeration work of and for the Railroad Company at Pocatello, Idaho, and in connection with the handling of said refrigeration desires to secure from the Railroad Company, electric power for use in connection with said refrigeration; and

"Whereas, the Idaho Power Company is under contract with the Pacific Company which contract provides that in case the said Idaho Power Company furnishes power to the Railroad Company at a different rate than that provided in said contract then the Pacific Company can secure power through

the Railroad Company as herein provided, and,

“Whereas, the Idaho Power Company has now made a contract with the Railroad Company in which the Idaho Power Company agrees to furnish power to the Railroad Company at a different rate than that provided in said [366] contract between the Idaho Power Company and the Pacific Company;

“Now therefore, this agreement witnesseth:

“1. The Railroad Company will construct pole and wire lines and a 600 KVA transformer station necessary for the delivery of power at approximately 2300 volts and 60 cycles to the Pacific Company hereunder, maintenance, repairs, renewals and changes in said constructions shall be made by the Railroad Company at the cost and expense of the Pacific Company.

“2. The Pacific Company agrees to receive power at a point of delivery to be agreed upon between the parties hereto and at its own expense to install and maintain all equipment necessary for the application of said power beyond the point of delivery.

“3. The Pacific Company agrees to reimburse the Railroad Company for the cost of the installation, maintenance, repair and renewal of said pole and wire lines, transformer station and all other apparatus and equipment installed by it for the delivery and measurement of electric current delivered to the Pacific Company under this agreement.

“4. The Pacific Company agrees to pay to the Railroad Company for the electric power delivered under this agreement the same average rate per KW hour as the [367] Railroad Company pays to the Idaho Power Company, plus ten per cent which is to include the transmission line and transformer losses and the fixed charges and maintenance on such railroad equipment and apparatus as is used by the Railroad Company for delivering electric power to the Pacific Company.

“5. The Railroad Company will install and maintain, at the expense of the Pacific Company, standard meters to measure the electric service used by the Pacific Company, and will inspect such meters from time to time.

“6. The Railroad Company, at any time upon the written request of the Pacific Company will test the meter of said Pacific Company within 30 days after receipt of such request, and the Pacific Company agrees to accept the result of such test, as a basis for the settlement of the Pacific Company's account. If any such test shall show the average error of the meter to be less than three per cent, the Pacific Company shall pay the expense of the test; except, that where the meter has not been tested at the request of the Pacific Company, within the 12 months' period immediately preceding such request, the test will be made without charge to the Pacific Company. The Railroad Company may at any time, at its own expense, test any of the meters. An average error of more than three per cent will be considered in determining the Pacific

[368] Company's use of electric service, the Railroad Company refunding where the meter is fast and the Pacific Company paying the difference where it is slow.

"7. If the Railroad Company's meters shall fail to register at any time, the service delivered and energy consumed during such failure, in the absence of a more accurate basis, may be determined on the basis of the nearest corresponding equal period of use when there was no such failure, subject to corresponding credit to the Pacific Company for any nonuse during any such failure. If any appliances or wiring connections shall be found on Pacific Company's premises which prevent the meters from accurately recording the total amount of energy used on the premises, the Railroad Company may at once remove such wiring or appliances at the Pacific Company's expense, and may estimate the amount of energy so consumed and not registered, as accurately as it is able so to do, and the Pacific Company will immediately pay for such energy.

"8. The average error of a meter is defined as one-half of the algebraic sum of: (1) The error at light load, and (2) The error at heavy load. Light load shall be considered to mean approximately 5 per cent to 10 per cent of the rated capacity of the meter. Heavy load shall be considered to mean not less than 60 per cent nor more than 100 per cent of the rated capacity of the meter. No [369] meter will be installed which has an error of more than plus 2 per cent or minus 3 per cent at light

load, or plus or minus 2 per cent at heavy load. Whenever an installation, periodic or any other test a meter is found to exceed these limits, it will be adjusted or replaced.

“9. Bills properly chargeable to the Pacific Company hereunder shall be paid by the Pacific Company within 30 days after presentation by the Railroad Company.

“10. In case the Railroad Company shall, at any time, during the term hereof, generate in its own plant all or part of the electric power used at the Pocatello terminal, the Pacific Company agrees to pay to the Railroad Company for electric power delivered under the terms hereof at such new rate as may be specified by the Railroad Company; such new rate to be equal to the cost including fixed charges plus 10 per cent. The cost to be determined by the Railroad Company. In case the new rate is not satisfactory the Pacific Company may terminate this agreement at any time by giving to the Railroad Company 30 days written notice of its intention so to do.

“11. Either party may terminate this agreement at any time after one year from the date hereof by giving to the other party 90 days notice in writing.

“12. The Railroad Company being dependent upon the Idaho Power Company for power does not guarantee the [370] delivery of any specific amount of electric power under this agreement or the delivery of power for any specific period or an uninterrupted supply of electric power, and in case a limited supply of electric power is, for any

period of time, furnished to the Railroad Company, it will distribute such supply, as between the parties hereto, to the best advantage, giving due consideration to the relative importance of the various units to be operated and the amount of electric power available.

“15. The servants and employees of the Railroad Company, while engaged on the construction, reconstruction, alteration, maintenance, repair, renewal or operation of said transformer station and wire line shall be considered to be the servants and employees of the Pacific Company.

“16. This agreement shall take effect on the first day of March, 1925, and unless sooner terminated as herein provided, shall remain in force until the 28th day of April, 1929.

“17. This agreement shall inure to and be binding upon the successors in interest of the parties hereto.

“In Witness Whereof, the parties hereto have caused this agreement to be executed on the day and year first above written. Oregon Short Line Railroad Company by C. R. Gray, its president. Witness: F. J. Melia. Attest: C. B. Mattha, Assistant Secretary. Pacific Fruit [371] Express Company, by H. Giddings, its Vice President and General Manager. Witness: Fred Garrigues. Attest: G. S. King, Assistant Secretary. Approved as to form, John Bannewitz, Contract Attorney. A. H. Babcock, Electrical Engineer. Approved, H. V. Platt, General Manager; Approved, W. R. Armstrong, Assistant Chief Engineer; Approved as to

form, George H. Smith, General Attorney; Approved as to execution, George H. Smith, General Solicitor.”

Mr. Davis: I would not suggest this if the paragraphs were not short but in order that this may be more readily understood could we have the two paragraphs read at this time.

The Court: Yes, you may.

Mr. Anderson: As to that, your Honor, on this contract I would like to make an objection to the proposal of Mr. Davis, because, so far as this case is concerned these two paragraphs have nothing to do with this case whatever. I think it is very similar to making an objection to some question asked of a witness on the stand that it may be incompetent, irrelevant and immaterial and this portion is also incompetent, irrelevant and immaterial as to the issues of this case and we make that objection.

The Court: There was some question came [372] up with regard to the interest of witnesses connected with the PFE or their interest. I think a great deal of a contract and I think a great deal of the contract that you have read here, but in my opinion I think it is all immaterial and not necessary but the Court feels that if any part of a contract is read to the jury that the jury would be confused as to any portion that is not read and I think it should be in the record, the portion eliminated would confuse this jury. It goes to the question of interest. You may read the two paragraphs as you request, Mr. Davis.

Mr. Davis: Paragraph No. 13 which was omitted



by Mr. Anderson is as follows: "13. Neither the Railroad Company nor the Pacific Company shall be liable to the other for any act or omission caused directly or indirectly by strikes, labor troubles, accidents, litigation, United States, state or municipal interference, or other causes not due to negligence, but the cause producing such act or omission shall be removed with all reasonable diligence." And the next paragraph omitted: "14. The Pacific Company will indemnify, save harmless and defend the Railroad Company against all claims, demands, costs or expense for death of or injury to persons or loss of or damage to property, in any manner directly or indirectly connected with or growing out of the transmission or use of electric service by the Pacific Company, at or on the [373] Pacific Company's side of the point of delivery."

The Court: You may now proceed, Mr. Anderson.

Mr. Anderson: I overlooked calling your Honor's attention to the fact that this contract expired on the 28th day of April, 1929.

The Court: This contract expired on the 28th of April, 1929?

Mr. Anderson: Yes, this was just a construction contract and I think that portion read by Mr. Davis should be stricken, or the jury should be instructed to disregard what Mr. Davis read.

The Court: And then I better instruct them to disregard what you read too, hadn't I?

Mr. Anderson: No, because it leads right up to

the question of ownership, that has to do with the construction and leads right up to this question.

The Court: I thought that if I let a part of this contract in without having it all that the jury would be confused, and now you have me confused, you say that the contract expired on the 28th of April, 1929, and still you want to leave a part of it in this record and take a part out.

Mr. Anderson: As I say, your Honor, it has to do with the construction and ownership, that was the [374] purpose.

The Court: I will take your motion under advisement and I will read it again.

Mr. Anderson: And now, with the Court's permission, I will read Exhibit No. 27 to the jury.

The Court: You may do so.

Mr. Anderson: This is Exhibit No. 27: "Contract Department No. C-10475". Also in blue pencil, "1775-E Lease; ACE No. 8298 Audit No. 6978 from Oregon Short Line Railroad Company to Pacific Fruit Express Company. Transformer site at Pocatello, Idaho." Then follows a mailgram: "Pocatello, Idaho, April 29, 1926. W. S. Ure Salt Lake Your mailgram of the 28th inst. and previous correspondence relative to contract audit No. 13133 with Pacific Fruit Express Company. This service was first started for the PFE Company on August 28, 1925, the first charge appearing therefor was on September, 1925, bill. D-187. A C Hinckley. Original filed with contract audit No. 13133.

"This supplemental agreement, made and entered into this 23rd day of February, 1926, by and

between Oregon Short Line Railroad Company, a corporation of the State of Utah, hereinafter called "Railroad Company", party of the first part and the Pacific Fruit Express Company, a corporation of the State of Utah, hereinafter called "Car Line", party [375] of the second part, witnesseth:

"Recitals: the parties hereto are parties to an agreement dated February 11, 1916, which, among other things, contains provisions relating to the leasing by the Railroad Company to the Car Line of property of the Railroad Company for certain purposes therein set forth; and the parties hereto are also parties to an agreement dated on the 1st of March, 1924, which provides for the furnishing of electric power to the Car Line by the Railroad Company. The Car Line now desires to lease from the Railroad Company, certain property at Pocatello, Idaho, hereinafter more specifically described.

"Agreement: Now, therefore, it is mutually agreed by and between the parties hereto as follows, to wit:

"Section one. The Railroad Company hereby leases to the Car Line a transformer and transmission line site at Pocatello, Idaho, as more fully described and set forth in the schedule and plat marked Exhibit A and B, respectively, hereto attached and hereby made a part of this agreement.

"Section two. The value of the leased premises shown on Exhibit B is 13 and 20-100 dollars, as per detail set forth in Exhibit A. In addition to the rental to be paid for the use of the property above referred to the Car Line hereby agrees to

pay to the Railroad Company as rental for the property occupied by transmission lines as [376] herein provided, five and no-100 dollars per annum.

“Section three. This lease shall be subject to all of the terms and conditions with respect to rental and otherwise, except as provided in Section two and Section four hereof, contained in said agreements of February 11, 1916, and the 1st day of March, 1924, to which this agreement is supplemental, and the parties hereto severally agree for themselves, their successors and assigns, to be bound by all of said terms and conditions.

“Section four. This agreement shall take effect as of the date on which the power is delivered to the Car Line under said agreement of March 1, 1924, and shall continue in full force and effect for a period of one year and thereafter until terminated on the last day of any month by either party hereto giving to the other party written notice on or before the last day of the preceding month of its intention so to terminate the same.

“In witness whereof, the parties hereto have caused this agreement to be executed in duplicate as of the day and year first herein written. Oregon Short Line Railroad Company by E. E. Calvin, its Vice President, witness J. S. Sykes. Pacific Fruit Express Company by H. Giddings, its Vice President and General Manager, Attest, G. S. King, Assistant Secretary. Location and description correct, H. T. Whyte, Assistant General [377] Manager by”, and I cannot make out that signature and it further is: “Approved H. V. Platt, General

Manager. B. H. Prater, Assistant Chief Engineer. Form approved: George H. Smith, General Attorney; John A. Beniwitz, Contract Attorney. Execution approved: George H. Smith, General Solicitor." Attached to that is Exhibit A which is: "Exhibit A. Oregon Short Line Railroad Company. Schedule showing value of land of the Oregon Short Line Railroad Company, at Pocatello, Idaho, leased to the Pacific Fruit Express Company.

"Land occupied by transformer station and transmission line. Transformer station: 15 feet by 22 feet equals 330 square feet at \$.04 per square foot equals \$13.20.

"Beginning at a point which is 153.0 feet perpendicularly distant southwesterly from the center line of double main tracks of the Oregon Short Line Railroad at engineer's station 11377 plus 78.0, which station is 98.1 feet southeasterly measured along the center line of double main tracks from its intersection with the north line of section 27, township 6 south, range 34 east, Boise Meridian; thence northwesterly and parallel to center line of double main tracks a distance of 15.0 feet; thence at right angles southwesterly a distance of 22.0 feet; thence at right angles a distance of 15.0 feet [378] southeasterly; thence at right angles a distance of 22.0 feet northeasterly to point of beginning.

"Also a site for a transmission line extending from the above described property to an existing pole of the railroad company 38.0 feet perpendicularly distant northeasterly from said center line of

double main tracks at engineer's station 11377 plus 78.0.

“Also a site for a transmission line from the above described property to a point in the right-of-way boundary line 181.0 feet perpendicularly distant southwesterly from the said center line of double main tracks at engineer's station 11378 plus 74.0.”

Exhibit B is a blueprint on which is outlined in yellow the sub-station lease and a line which extends across the tracks to the OSL transmission line.

Now, I will read Defendant's Exhibit No. 28: “1775-E. L and T No. 10696. Audit No. 9145.

“This agreement made and entered into this 19 day of July, 1932, by and between Oregon Short Line Railroad Company, a corporation of the State of Utah, hereinafter called Lessor, party of the first part, and Pacific Fruit Express Company, a corporation of the state of Utah, hereinafter called Lessee, party of the second part, witnesseth: [379]

“Section 1. The lessor, for and in consideration of the covenants and payments hereinafter mentioned to be performed and made by the lessee, hereby agrees to lease and let and does hereby lease and let unto the lessee for the term hereinafter specified, the following described premises of the lessor, together with the trackage located thereon, at Pocatello, Bannock County, Idaho, to-wit:

\* \* \* \* \*

Mr. Anderson: “A piece or parcel of land to be

used for a transformer site, described as follows to-wit:

“Beginning at a point which is 153.0 feet perpendicularly distant southwesterly from said center line of the double main track roadbed, at engineer’s station 11377 plus 78.0, which is 98.1 feet southeasterly measured along said center line from its intersection with the north line of said section 27; thence parallel [380] to said center line 15.0 feet northwesterly; thence at right angles 22.0 feet southwesterly; thence at right angles 15.0 feet southeasterly; then at right angles 22.0 feet northeasterly to the point of beginning, as indicated outlined and shaded in yellow on the print marked Exhibit B, which is hereby made a part hereof.

“The above described premises, including the trackage of the lessor located thereon, are hereinafter referred to as leased premises.

“Section 2. The lessee is also granted the right and license, subject to the observance and performance by the lessee of all and singular the conditions, covenants and agreements hereinafter contained to be by the lessee kept, observed and performed, to continue, during the term hereof, to maintain and operate to existing transmission lines, including the connection of one of them with the existing transmission line of the lessor, over and across a portion of the right-of-way of tracks and wires of the lessor in the locations described as follows, to-wit:

“One of said transmission lines extends from an existing pole of the lessor, which is 38.0 feet north-

easterly, measured at right angles from the center line of the double main track roadbed of the Oregon Short Line Railroad at engineer's station 11377 plus 85.3, [381] southwesterly 191.0 feet to the above described transformer site and crosses the aforesaid center line at right angles at engineer's station 11377 plus 85.3 which is 90.8 feet southeasterly measured along said center line from its intersection with the north line of section 27, township 6, south, range 34 east Boise Meridian.

"The other of said transmission lines extends from the above described transformer site northwesterly for a distance of 88.7 feet, more or less, to a point in the southwesterly right-of-way boundary of the Oregon Short Line Railroad 181.0 feet southwesterly, measured at right angles, from said center line of engineer's station 11378 plus 74.0, which is 9.4 feet southeasterly measured along said center line from its intersection with the north line of said section 27.

"The location of said transmission lines are substantially as indicated by dashed and dotted yellow lines and yellow circles on the aforesaid Exhibit B.

"Section 3. The lessee agrees to pay to the lessor for the use of the leased premises, rental at the rate of \$2,305.35 per annum, payable annually in advance. In addition to the foregoing rental the lessee agrees to pay to the lessor, for the right and license granted the lessee in Section 2 hereof, rental at the rate of \$5.00 per annum, payable annually in advance. Acceptance of [382] said rentals in advance by the lessor shall not act as a waiver of its



right to terminate this lease and agreement as hereinafter provided.

“If, during the term of this lease and agreement, any street or other improvements, whether consisting of new construction, maintenance, repairs, renewals or reconstruction shall be made, the whole or any portion of the cost which is assessed against or fairly assignable to the leased premises, the lessee agree to pay in addition to the other payments herein provided for 6 per cent per annum on the amount so assessed against or assignable to the leased premises during the remainder of the term of this lease and agreement from and after the date the expenditure by the lessor of such amount is made.

“The lessee further agrees to pay before the same becomes delinquent, all taxes levied during the continuance of this lease and agreement upon the leased premises and upon any improvements made upon the leased premises by the lessee.

“Section 4. The lessee covenants that the leased premises shall not be used for any other purpose than for light repair yard, shop, icing platform and transformer sites, and agrees that if the lessee abandons the leased premises, the lessor may enter upon and take [383] possession of the same.

“Section 5. The lessee agrees not to let or sub-let the leased premises, in whole or in part, or to assign this lease and agreement without the consent in writing of the lessor, and it is agreed that any transfer or assignment of this lease and agreement, whether voluntary, by operation of law or other-

wise, without such consent in writing, shall be absolutely void and, at the option of the lessor, shall terminate the same.

“Section 6. The lessee covenants and agrees that all buildings and all other structures erected upon the leased premises during the term hereof shall be of substantial design and construction and of a design and type satisfactory to the lessor, shall be painted by the lessee a color satisfactory to the lessor, and shall at all times be kept in good repair; that the roof of each such building shall be of fire resistive material, and when any building is without solid foundation the openings between the ground and the floor thereof shall be covered with fire resistive material; that in the construction, occupancy and use of said buildings and structures and in the use of the leased premises the lessee shall conform to all laws, ordinances and other public regulations now in effect or which may hereafter be enacted. [384]

“Section 7. The lessee shall fully pay for all materials joined or affixed to said premises, and shall pay in full all persons who perform labor upon said premises and shall not permit or suffer any mechanic's or materialman's of any kind or nature to be enforced against said premises for any work done or materials furnished thereon at the instance or request or on behalf of the lessee; and the lessee agrees to indemnify and hold harmless the lessor from and against any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of such work done,

labor performed or materials furnished." I am skipping Section 8.

"Section 9. Except as provided in Section 2 hereof the lessee shall not locate or permit the location or erection of any poles upon the property of the lessor, nor of any beams, pipes, wires, structures or other obstruction over or under any tracks of the lessor without the consent of the lessor." I am leaving out Sections 10 and 11.

"Section 12. It is further agreed that the breach of any covenant, stipulation or condition herein contained to be kept and performed by the lessee, shall, at the option of the lessor, forthwith work a termination of this lease and agreement, and of all rights of the lessee hereunder; that no notice of such termination or [385] declaration of forfeiture shall be required, and the lessor may at once re-enter upon the premises and repossess itself thereof and remove all persons therefrom or may resort to an action of forcible entry and detainer, or any other action to recover the same. A waiver by the lessor of the breach by the lessee of any covenant or condition of this lease and agreement shall not impair the right of the lessor to avail itself of any subsequent breach thereof.

"Section 13. This lease and agreement shall be retroactive to the 16th day of June, 1930, and shall continue in full force and effect for a period of one year from the date first herein written and thereafter until terminated on the last day of any month by either party hereto giving to the other party written notice on or before the last day of the pre-

ceding month of its intention so to terminate the same.

“Section 14. The lessee covenants and agrees to vacate and surrender the quiet and peaceable possession of the premises upon the termination of this lease and agreement howsoever. Within 30 days after the termination of this lease and agreement howsoever, the lessee shall, at its own expense, remove from the premises all property not belonging to the lessor. The lessor hereby acknowledges the title of the lessee in and to the improvements, other [386] than the trackage of the lessor forming part of the premises described in Section 1 hereof, located on the leased premises as of June 16, 1930.

“Section 15. This lease and agreement supersedes and terminates as of the effective date hereof and previous agreements of lease between the parties hereto, dated respectively the 20th day of January, 1925; the 25th day of September, 1929; the 23rd day of February, 1926; and the 10th day of December, 1926; designated in the files of the lessor as leases ACE No. 7948, audit No. 6680, supplement to ACE No. 7948, audit No. 6680; ACE No. 8298, audit No. 6978; and ACE No. 8845, audit No. 7239 respectively; which said agreements provide for the leasing to the lessee by the lessor of certain property of the lessor at Pocatello, Idaho, for yards and light repair shop site, transformer and transmission line site and for an icing platform site.

“Section 16. Subject to the provisions of Sec-

tion 5 hereof, this lease and agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns. In witness whereof, the parties hereto have caused this lease and agreement to be executed in duplicate as of the date first herein written. Oregon Short Line Railroad Company by William Jeffries, its Vice President. Witness: F. J. Delehanty. Pacific Fruit [387] Express Company by H. Giddings, its Vice President and General Manager. Witness: C. O. Hivelin. Attest: G. S. King, Assistant Secretary. Valuation location and description approved: H. T. Whyte, Assistant General Manager, by H. T. Whyte."

Attached to these are two blue prints. The first is marked Exhibit A and refers to the lease of property other than the transformer site and Exhibit B has reference to the lease of the transformer site and the transmission lines across the track over to the ice plant which are all shown in yellow on the blueprint.

Mr. Davis: Now, if the Court please, may we read these portions which we desire, that were omitted by Mr. Anderson.

The Court: Yes, you may.

Mr. Davis: I will read Section 10.

Mr. Anderson: Just a moment, Mr. Davis, we object to the reading of these sections, because this has nothing to do with this suit and we are not trying out anything else other than what is confined to the issues here. It is wholly incompetent,

irrelevant and immaterial and just has nothing to do with this case.

The Court: I requested authorities on this matter and, of course, none were handed to me. I did some work and all of the authorities that I can [388] find are to the effect that when one part of a writing is presented then the opposing side was entitled to have it all. In view of the fact that there is no ruling to the contrary presented to the Court I will permit the reading of this part.

Mr. Davis: "Section 10. The lessee shall be liable for any and all injury or damage to persons or property of whatsoever nature or kind, arising out of or contributed to by any breach, in whole or in part, of any covenant of this lease and agreement.

"Section 11. The provisions relating to liability contained in that certain agreement between the Union Pacific Railroad Company, the lessee, and the Southern Pacific Company dated July 28, 1928, concerning the protection of perishable freight in transit, and any amendment thereof or supplement thereto, shall govern as between the parties hereto in the matter of liability for loss of or damage to property or injury to or death of persons occurring in any way incident to the lessee's occupation and use of the premises herein leased, or the lessee's use and enjoyment of the right and license herein granted."

Mr. Casterlin: We move to strike that on the ground that Section 10 has to do with liability for [389] breach of contract as between the parties

thereto. This case is not predicated on any breach of contract and this suit is not between the PFE and the Union Pacific and that is all that Section 10 has to do with. Now, Section 11 has to do with the liability of freight or rather for freight in transit. This case does not involve any freight in transit and there is no liability by reason of that fact. It goes on to say,—and I am paraphrasing somewhat, any amendment to the agreement of July 28, 1928, or any supplement thereto shall govern the parties therein in certain respects. That is unintelligible because in the first place the contract of July, 1928, is not in evidence,—

The Court: I think you have a point there, Mr. Casterlin, there should be another contract so that we could understand what this is about. I think that you will admit that for me to sort out what is pertinent,—and I might say that I doubt that any of this is pertinent, of course, I want to say to the jury that they will pay no attention to my remarks here,—but for me to figure out what should be admitted and what should not be admitted here now of these instruments, that would be quite a task.

Mr. Casterlin: The theory on which they were admitted was that the Union Pacific Railroad Company has nothing to do with the ownership and nothing to do with [390] the operation or maintenance or the ownership of this sub-station or the line from the Batiste line, leading over to this line.

The Court: And now, Mr. Casterlin, you are arguing the case. The evidence is for the jury to

weigh and to determine whether it is true or not. I am a little in doubt as to this question as to the entire contract, first as I recall, it was objected to on the part of the plaintiff and then on the part of the defendant as to admitting all of the contract.

Mr. Casterlin: If the Court please, that was for the purpose of confining the exhibits to the purpose for which they were offered and not letting this case go too far afield.

The Court: I have ruled now, however, I will say that I will take your motion under advisement.

Mr. Anderson: Exhibit No. 29: "Contract Department No. 17566A. 1775E. Oregon Short Line Railroad Company Lease Audit No. 9145. Supplement No. one to lease. L and T No. 10696. Audit No. 9145 from Oregon Short Line Railroad Company, Union Pacific Railroad Company to Pacific Fruit Express Company. Increased area for maintenance and operation of transformer at Pocatello, Idaho.

"Supplement No. One, Lease L and T No. 10696.

"This supplemental agreement, made and entered [391] into this 24th day of November, 1942, by and between the Oregon Short Line Railroad Company, a corporation of the State of Utah, and its lessee, Union Pacific Railroad Company, a corporation of the State of Utah, hereinafter collectively called, lessor, parties of the first part, and the Pacific Fruit Express Company, a corporation of the State of Utah, hereinafter called lessee, party of the second part, witnesseth:



“Recitals: On the 19th day of July, 1932, the Oregon Short Line Railroad Company and the lessee herein entered into a written agreement of lease, designated in the files of the lessor, as lease CE No. 10696, audit No. 9145, under the terms of which certain space on the right-of-way of the lessor at Pocatello, Bannock County, Idaho, together with the trackage thereon, were leased to the lessee for the maintenance and operation of yards, light repair shop, transformer, transmission line and icing plant, for an indefinite term.

“It is now the desire of the parties hereto to supplement and amend the aforesaid lease of July 19, 1932, to provide for the use by the lessee of an increased area for the maintenance and operation of the aforesaid transformer, described in said lease and shown on Exhibit B attached thereto, and to provide for an increase in the amount of rental to be paid by the lessee therefor. [392]

“Agreement: It is, therefore, covenanted and agreed, by and between the parties hereto as follows, to-wit:

“(1) Premises: Paragraphs 4 and 5 of Section 1 of the aforesaid lease of July 19, 1932, are hereby amended to read as follows:

“A piece or parcel of land to be used for a transformer site, described as follows:—

The Court: Do you need to read the description, Mr. Anderson?

Mr. Anderson: I take it that is not necessary, your Honor, and I will not read the description but go to Paragraph 2.

“(2) Rental: Section 3 of the aforesaid lease of July 19, 1932, is hereby amended to read as follows:

“The lessee agrees to pay to the lessor for the use of the leased premises, rental at the rate of \$2,307.01 per annum, payable to the Union Pacific Railroad Company annually in advance. In addition to the foregoing rental the lessee agrees to pay to the lessor, for the right and license granted to the lessee in Section 2 hereof, rental at the rate of \$5.00 per annum, payable to the Union Pacific Railroad Company annually in advance. Acceptance of said rentals in advance by the lessor shall not act as a waiver of its right to terminate this lease and agreement as [393] hereinafter provided.

\* \* \* \* \*

“(3) Union Pacific Railroad Company included as a party:

“The Union Pacific Railroad Company, lessee of the railroad and other property of the Oregon Short Line [394] Railroad Company, is hereby included as a party to said agreement and it is understood that wherever the word lessor appears in said agreement, it shall be taken to mean the Oregon Short Line Railroad Company and the Union Pacific Railroad Company collectively.

“(4) Effective date,—term:

“This supplemental agreement shall be effective as of the 1st day of May, 1942, shall be attached to and become a part of the aforesaid agreement of July 19, 1932, and the same shall remain in full force and effect in accordance with the terms thereof, subject to termination as therein provided.

“In witness whereof the parties here to have caused this agreement to be executed in duplicate as of the day and year first herein written. Oregon Short Line Railroad Company, Union Pacific Railroad Company, by E. F. Ashby, Vice President. Witness: P. A. Schmitz. Pacific Fruit Express Company, by K. V. Plummer, its Vice President and General Manager. Witness: C. O. Hisely. Attest: Roy G. Hillebrand, Assistant Secretary. Approved: H. T. Whyte, Assistant General Manager. Approved: E. G. Conners, Vice President, Operations. Approved: B. W. Hanson, Traffic Manager. Approved as to form: George H. Smith, General Solicitor. Approved as to execution: E. M. Sawyer, Land and Tax Agent, F. J. Melia, Contract Attorney. [395] Approved: R. E. Titus, General Manager. Approved: W. H. Hulsizer, Manager of Properties.” There is a stamp here that is not quite legible except in part and that part is: “Approved: H. T. Whyte, Assistant General Manager by F. E. Dahlin.”

Attached to that is a blueprint, showing the enlarged transformer site from 15 by 22 feet to 32 by 31 feet, also the extension of the lines to the PFE plant.

Mr. Davis: If the Court please, we would ask if we cannot have and request that we be furnished the lease agreement between the Union Pacific Railroad Company and the Southern Pacific Railroad Company and the Pacific Fruit Express as referred to in Section 11 of Exhibit No. 28 which was read to the jury by counsel.

Mr. Anderson: We do not have it, Mr. Davis.

The Court: They say they don't have it.

Mr. Davis: May we ask Mr. Judge another question on cross examination.

The Court: Yes, you may.

#### Recross Examination

Q. (By Mr. Davis): Mr. Judge, on the morning or during the forenoon of November 4, 1950, did Mr. H. O. Johnson introduce you to Mr. Guy McClellan as an electrician?     A. No, sir. [396]

Q. You were not introduced to Guy McClellan as an electrician?     A. No, sir.

Mr. Davis: That's all.

Mr. Anderson: No questions.

#### AUBURN C. TAYLOR

called as a witness by the defendant, after being first duly sworn, testifies as follows:

#### Direct Examination

Q. (By Mr. Anderson): Your name is Auburn C. Taylor?     A. Yes, sir.

Q. Where do you reside, Mr. Taylor?

A. At 1115 Northeast 114th Avenue, Portland, Oregon.

Q. And what is your occupation?

A. Electrical supervisor for the Union Pacific Railroad Company.

Q. How long have you been employed by the Union Pacific?     A. Approximately 12 years.

Q. Has that all been engaged in electrical work?

A. Yes, sir.

Q. Were you located at Pocatello at one time?

(Testimony of Auburn C. Taylor.)

A. Yes, sir.

Q. In what capacity?

A. As an electrician,—lead electrician and electrical foreman.

Q. Over what period of time were you here in Pocatello? [397]

A. I came to Pocatello in 1942 and I worked around Pocatello, in and out, on electrical work until November 1, 1952.

Q. What was your occupation here, or your title on November 4, 1950?

A. Lead electrician.

Q. What does that mean, lead electrician?

A. On this job I was in charge of the electrical work in Pocatello. There were 11 electricians and I was in charge of the electricians and the work.

Q. Was that for the Union Pacific Railroad Company?

A. Yes, sir, for the Union Pacific Company.

Q. Did you or any of these men work for the Pacific Fruit Express Company, that is, were you on their payroll?

A. No, sir.

Q. Mr. Taylor, I take it that you are familiar with the Pacific Fruit Express Company sub-station and the connection to it?

A. Yes, sir.

Q. Is there a line, extending from the sub-station, over across the track to the so-called Batiste line?

A. Yes.

Q. Is there a connection on the pole on the Batiste line, where it takes off and comes to the sub-station?

A. Yes, sir.

(Testimony of Auburn C. Taylor.)

Q. What kind of a connection is that?

A. It is commonly referred to as a junction pole and the [398] connection is made through some disconnect switches to their line.

Q. Can you state whether that is the point where the electrical energy is delivered to the Pacific Fruit Express Company?

A. To my knowledge, yes, that is the point.

Q. Has there been an occasion or occasions when you were called to do work for the Pacific Fruit Express Company as an electrician?

A. Yes, sir.

Q. Do you recall whether there was any of that work to be done in 1949 or 1950. Were you ever called for those two years?

A. As near as I can recall it was in 1949.

Q. And did you, in 1948, do some work?

A. Yes.

Q. I show you Defendant's Exhibit No. 33, is that the work which you and your gang did for the Pacific Fruit Express Company?

A. Yes.

Q. How did you happen to do that work, was it at someone's request?

A. Yes, it was at someone's request.

Q. Do you know whose it was, was it the Pacific Fruit Express or the Railroad Company?

A. This work wasn't done at that location—

Q. Yes, I understand that. [399]

A. A dock had been built by the Pacific Fruit Express Company and they requested service for

(Testimony of Auburn C. Taylor.)

this dock which contained an ice crusher and conveyor. Our power lines were,—we had a power supply near that and they wanted service for this facility and when service was requested we performed the work.

Q. Did you or any of your employees working under you, did you ever have a key or keys to the Pacific Fruit Express Company sub-station?

A. No, sir.

Q. Do you know who did have the key?

A. The plant superintendent at the Pacific Fruit Express Company.

Q. If there were any repairs to be made at the Pacific Fruit Express Company or if they wanted any service performed by the Railroad, did they ordinarily contact you?

A. You mean directly?

Q. Well, did you have any work to perform for them in 1949 or '50?

A. Yes, and they would ordinarily make contact with me.

Q. Did you work on November 4, 1950?

A. No.

Q. Do you know what day of the week it was?

A. That was on Saturday.

Q. Are your craft or the men that worked for you and yourself [400] on a five-day week and is that the reason that you didn't work Saturday?

A. Yes, sir.

Q. When did you first learn of Mr. Johnson's injury?

A. Sunday morning, as I recall.

(Testimony of Auburn C. Taylor.)

Q. It was on the following day?

A. Yes, on the following day.

Q. Did anyone from the Pacific Fruit Express Company call you at all on Saturday, November 4, 1950?

A. No, sir.

Q. Do you know whether any of your employees were called to go over around the PFE plant that day?

A. None were called.

Q. Would you know that, and if so, how?

A. A time-card is made for all of the time worked and it was necessary that I check and approve all of the time-cards.

Q. Did you approve any for that day?

A. I approved two cards for that day.

Q. And what were they?

A. Two men worked at re-lamping the flood lights in the retarder yard on Saturday evening.

Q. That was on November 4, 1950?

A. Yes, sir, on November 4.

Q. Where is the retarder yard with reference to the Pacific Fruit Express Company ice plant?

A. It is south. The Pacific Fruit Express Company would be on the north end of the yard and the retarder yard on the south end.

Q. About what is the distance between them?

A. I would say a mile and a half.

Q. I think that you said that you were acquainted with the sub-station and the equipment in there?

A. Yes, sir.

Q. Do you know anything in that sub-station that was defective?

A. No.



(Testimony of Auburn C. Taylor.)

Q. That would be prior to November 4, 1950, or on November 4, 1950?      A. No, I don't.

Q. Can you state what the fact is as to whether or not that sub-station was operating effectively so far as delivering electrical energy to it and supplying the Pacific Fruit Express Company?

A. I would say that it was operating properly.

Q. I presume that you have heard the testimony,—have you been in court during the trial?

A. No, I have not been in court until today.

Q. Let me ask you this, are there switches in that sub-station which will de-energize all of the power in the sub-station, if operated?

A. As one set of switches or two? [402]

Q. I said switches?

A. Yes, there are switches that will.

Q. One switch does what?

A. One set of switches will disconnect the transformer and they operate together, and the other set are three individual switches and they operate to disconnect the lightning arresters.

Q. And if all four of those are pulled or disconnected, is there any power left alive in this station?      A. None within reach.

Q. Is this transmission line across the tracks to the sub-station, is that used for any purpose by the Railroad Company?      A. No.

Q. Mr. Taylor, are you a graduate of some electrical school,—do you have a degree or something to qualify you as an electrician?

A. I have served an apprenticeship and I have

(Testimony of Auburn C. Taylor.)

three years of engineering, I do not have a degree.

Q. In connection with your studies and your experience, are you able to say that when this sub-station was constructed in 1925, was it a standard sub-station?     A. Yes, sir, it was.

Q. During the time that you were here in Pocatello, working as an electrician or a lead electrician, did you or any [403] of your men ever change the transformer oil in the transformers for the Pacific Fruit Express Company?

A. No, sir.

Q. What is the fact as to whether or not you had any duties to perform over about the Pacific Fruit Express Company property, on the sub-station in question without a request from someone in the Pacific Fruit Express Company?

A. I didn't have any to perform, no.

Q. You work for the Union Pacific?

A. Yes, sir.

Q. And you are not on the payroll for the Pacific Fruit Express Company?     A. No.

Mr. Anderson: I think that is all, you may cross examine.

#### Cross Examination

Q. (By Mr. Davis): How old are you, Mr. Taylor?     A. 35.

Q. Now, insofar as you are concerned, in connection with your duties to your employer, the Union Pacific, and any work done for the PFE, you were operating under a written contract that they had, were you not?

(Testimony of Auburn C. Taylor.)

A. I didn't have any contract to work. I was only working [404] under instructions to work for them and we would be compensated.

Q. And who gave you instructions to work for the PFE and that you would be compensated?

A. When I went to work the fellow over me was C. M. Seainer and he issued those instructions to me and they were never changed by anyone over me after that time.

Q. And your instructions, at all times were, if the PFE wanted any electrical work or inspection done, if they requested it of you, you and your force should do it?

A. I don't believe that the instructions were quite that way.

Q. How were they?

A. The instructions were that so far as the PFE Company lines involved our lines and the work involved where trouble on their lines or property would jeopardize our line, we would at their request perform the work for them.

Q. If I understand it, you were only to do the work for the PFE if it would protect railroad property?      A. No, sir.

Q. Did the superintendent or anyone at the PFE plant get men from your crew at the time that you were working here, to come out if they wanted them?

A. I myself was in contact with the division engineer's office at Pocatello,—later we had a telephone of our own. If [405] they were unable to

(Testimony of Auburn C. Taylor.)

contact us by telephone they generally contacted us through the division engineer's office.

Q. The PFE tried first to contact your department by telephone if they wanted work done?

A. I don't know what the procedure was that they used.

Q. You don't know and you were in charge as lead man?     A. Not for the PFE.

Q. No, you were in charge for the Union Pacific as lead man for how many years, Mr. Taylor?

A. For ten years.

Q. And you don't know what arrangement there was or how the PFE tried to get in touch with your office if they wanted or needed an electrician?

A. I answered that a moment ago. We had a telephone and if they were able to reach us contact was made that way, that is how they contacted us and if not, we were in contact with the division engineer's office here in Pocatello. The road gang works over the whole division and we have to contact and tie up so that they will know where to contact us.

Q. What other electrical department did the Union Pacific have beside the road crew?

A. They have a shop crew.

Q. Was the shop crew under you?

A. No, sir. [406]

Q. They have a shop crew of electricians?

A. Yes, sir.

Q. Do you know how many electricians they employed there during your time here?

(Testimony of Auburn C. Taylor.)

A. No, sir, I cannot give a figure on that.

Q. In your road crew there were 11 electricians?

A. Yes, sir.

Q. Now, the Union Pacific had, here in Pocatello, during your time a regular electrical distribution system, didn't they?

A. Would you repeat that question?

Mr. Davis: Will you read it, Mr. Vaughan?

(Question read by reporter.)

A. As a system you mean that we distributed power among our facilities?

Q. Yes.            A. Yes.

Q. You had your own transmission lines?

A. Technically they were distribution lines.

Q. You had a distribution line?            A. Yes.

Q. Well, you transmitted this 12,500 volts of electricity over that line, didn't you?

A. Yes.

Q. You had how many sub-stations under your supervision?

A. I think we have possibly seven. [407]

Q. You think you have approximately seven sub-stations?            A. Yes.

Q. You are thoroughly familiar with the construction and conditions that existed at the Pacific Fruit Express sub-station which you refer to on November 4, 1950, were you not?

A. So far as the construction is concerned, I was familiar with it.

Q. And you became familiar with it by seeing it and observing it and going in to it, didn't you?

(Testimony of Auburn C. Taylor.)

A. That is right.

Q. You have been in there, haven't you?

A. Yes.

Q. And your men have been in it?

A. Some of them have, yes.

Q. Now, you know that the meter reader,—he was an electrician, was he not, Mr. Eskilson?

A. Yes, electrical foreman.

Q. Electrical foreman at the shops?

A. Yes.

Q. You stated, I believe, that you had no duties whatever,—that is, your department had no duties with reference to the sub-station?

A. That is right, with reference to this sub-station.

Q. Yes, that is the one I am talking about?

A. Yes, sir, that is right.

Q. You know that you had a duty under agreement between the Oregon Short Line Railroad Company and the agreement with the Union Pacific Railroad Company and the company, to read the meters every month?

A. I had nothing to do with that.

Q. But the Union Pacific had that duty under the agreement?     A. I cannot say.

Q. That is out of your jurisdiction?

A. Yes, sir.

Q. Do you know or don't you know that your employer had an agreement to inspect the meters at this sub-station?     A. I didn't know it.

Q. And you don't know it now?

(Testimony of Auburn C. Taylor.)

A. No, sir.

Q. Now, you knew at the time you worked and you know now that the PFE didn't have any regular or competent electricians out at their plant, didn't you?

Mr. Anderson: We object to that as being immaterial.

The Court: It may be immaterial but I think all of the officers and the supervisors who testified said that they didn't have any and I think it is recognized that they did not. \* \* \* \* \* [409]

Q. What is your position now, Mr. Taylor?

A. I am with the Union Pacific Railroad Company, I am electrical supervisor of the Northwest District from Huntington, Oregon, west.

Q. And who had the position that you have now, when you were stationed at Pocatello?

A. D. G. Williams, he is now the Union Pacific electrical [410] engineer.

Q. From Huntington on northwest, you are the supervisor of all of the electrical equipment?

A. Not all.

Q. Do you know Mr. Hugstead? A. Yes.

Q. What position did he have in Pocatello when you were here?

A. The same as he has now.

Q. And what is that?

A. He is the electrical supervisor over this district.

Q. And he lives in Salt Lake City, Utah?

A. Yes.

(Testimony of Auburn C. Taylor.)

Mr. Davis: I am sure as I recall if I heard, the witness testified that Mr. Hugstead held the same position that he did when he was in Pocatello.

Q. You were familiar, were you not, in a general way with the generators and electrical equipment that was in the PFE plant at Pocatello?

A. No.

Q. You know that those generators and the electrical equipment required the care and attention of electricians, do you not?     A. Yes.

Q. Can you say whether or not any of your men were in there or were ever familiar with it? [411]

Mr. Anderson: I object to that as immaterial and having nothing to do with the issues of this case.

The Court: He may answer.

A. I don't know.

Q. Do you know that none of them were ever in there during the time that you worked here at Pocatello?

Mr. Casterlin: We object to that, he has already answered the question, he says that he doesn't know.

The Court: He may answer again, as to whether he knows or not.

A. I don't know whether anyone is familiar with it or not,—not to my knowledge.

Q. Do you know as an electrician, and I am asking you now as an expert. As an expert you know that it would be natural and necessary for a plant the size of the Pacific Fruit Express Company



(Testimony of Auburn C. Taylor.)

plant here with the electrical equipment that it was using and the amount of energy that they purchased from the Union Pacific every month, to have someone that they could get in touch with immediately concerning the electrical equipment and the supply of energy, don't you?

A. Yes. \* \* \* \* \* [412]

Q. Now, Mr. Taylor, you don't mean to say that with the number of sub-stations that you had, seven, you say, and with the distribution lines, that electricians were not available for the caring of anything in connection with those sub-stations and equipment and lines, on Saturdays and Sundays?

A. Electricians were available for our work.

Q. Were electricians available on Saturdays and Sundays for the Pacific Fruit Express Company if they needed them, if they had any trouble out there or if there were breakdowns?

A. I don't know about the Pacific Fruit Express.

Q. I am asking you, if the electricians from your department, Mr. Taylor, were available for the Pacific Fruit Express Company if they called concerning anything of electrical trouble or about electrical trouble during Saturdays and Sundays?

A. If the men were available and they could get the proper authority for authorizing over-time, and an okay for our men to work we could probably find the men to work. [413]

Q. Now, do you know of any man or men in your crew at any time during the time that you

(Testimony of Auburn C. Taylor.)

were here, ever going to the Pacific Fruit Express Company in the night-time on a call for that company?     A. I don't recall any.

Q. By that you mean that you don't know whether they did or whether they did not?

A. If they had, during my time I would have known. There were no calls.

Q. You are now able to say that never, during the time that you worked here was there ever anyone or was it necessary to have anyone,—any electrician from your department who went to the Pacific Fruit Express Company during the night-time?

A. If I may make an explanation on that. The PFE Company took power from our line. There have been a number of times when we have had outage due to lightning or other trouble, which has given us trouble on our line and we worked,—our line goes right by theirs. I don't recall any trouble on anything at the PFE plant but we have worked our lines at night.

Q. And have you gone to this particular sub-station, you or any of your men at night?

A. No.

Q. You never did? [414]     A. No.

Q. When you have trouble on the rest of the power line, it would not affect the power that went into the sub-station, the 12,500 volts that was ahead of the switch?     A. Yes.

Q. And then when you had trouble it did affect this sub-station, didn't it?     A. Yes.

(Testimony of Auburn C. Taylor.)

Q. And you were notified of that, at night, by the PFE, were you not?

A. When our power line was out, we might get notified, yes, we might get notified from a half-dozen sources and I would say yes, that the PFE called as well as others.

Q. Now, Mr. Taylor, isn't it a fact that if the PFE needed electricians and called your department either day or night, somebody would be furnished to them?

Mr. Casterlin: I object to that, it is repetition, I think it has already been answered.

The Court: No, I don't think so. Can't you answer that straight up? A. Yes.

Mr. Davis: That is all. [415]

### Redirect Examination

Q. (By Mr. Anderson): That would depend, of course, on whether you might have anyone available to perform any work? A. Yes, sir.

Q. Now, with reference to the shop electricians, do you know their scope of operation?

A. They do not perform any line work.

Q. No line work? A. No line work.

Q. The testimony that you have given here, and what we have been talking about is line work?

A. Yes, sir.

Q. Mr. Taylor, have you ever been called upon by the Pacific Fruit Express Company to make inspections? A. No, sir.

Q. The question was asked by Mr. Davis about

(Testimony of Auburn C. Taylor.)

the power going out and you described that as some failure, maybe, on your own line?     A. Yes.

Q. If there was a failure on your line, or the Batiste line, would that affect the power to the Pacific Fruit Express Company?     A. Yes.

Q. And then you did what was necessary on your line and that [416] took care of the situation at the PFE?     A. Yes, sir.

Q. On the distribution of power, do you distribute power to anyone, that is, your own departments, for instance, to anyone other than the Pacific Fruit Express here?     A. No, sir.

Mr. Anderson: That's all.

### Recross Examination

Q. (By Mr. Davis): All of the power that is distributed by your line is distributed to the Pacific Fruit Express?

Mr. Casterlin: Oh, no, he didn't say that.

The Court: Yes, that is the way I understood him, you better clarify that. Will you read the question and answer, Mr. Reporter?

(Question and answer read by reporter.)

The Court: Do you understand the question and answer now?     A. Yes, sir.

Mr. Anderson: I did not understand it that way.

The Court: If you want to clarify it you better do it.

Q. (By Mr. Anderson): You didn't distribute any power except to [417] the PFE and the railroad?

(Testimony of Auburn C. Taylor.)

A. That is what I assumed, the question, the railroad and the PFE.

Mr. Anderson: That's all.

Recross Examination

Q. (By Mr. Davis): These seven sub-stations that the railroad has, you deliver energy through them?

A. Yes.

Mr. Davis: That is all.

Mr. Anderson: That is all.

The Court: We will adjourn at this time until 10:00 o'clock tomorrow morning.

November 25, 1953, 10:00 o'clock a.m.

Mr. Davis: With reference to the instrument that we asked to see and which was referred to in the exhibit, we assumed that our motion to produce, naturally, covered that as well as the things that were given to us by counsel. Now counsel has said to the Court that they don't have it which, I know, is correct, if counsel said so. We would like to know, however, where it is, whether it is in Pocastello or not and if [418] this case is not completed I am sure if the defendant needed it, it could be here Friday morning and we would like to have it.

The Court: I will not stop you from trying to get it here but I think maybe we are going to finish this case, I am going to have a conference sometime this morning with the jury and I will know whether we are going to finish today or not.

Mr. Davis: Well, of course, if it is completed and the instrument is not here then, of course, we will have to forego that.

The Court: You may call your next witness, Mr. Anderson.

HUBERT BRANAM

being recalled by the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Anderson): Mr. Branam, do you know, out at the PFE plant if you have any generators?

A. Only about 15 horsepower which is called an exciter,—we buy our current, our equipment which we have are motors.

Q. Have you had any occasion that you know of, to have any outside concern or the Railroad Company take care of [419] repairs that might be needed on the motors or the exciters?

A. No, I don't believe so, we have our own repairmen there and while they are not classified as electricians, they are trained to take care of that kind of equipment.

Q. Will you state whether or not it is necessary, where you do require any work, that you call the Union Pacific electricians?

A. We are not bound by rules,—one time I had the Idaho Power Company do some line work for me.

Q. And do you know that sometime in 1950,—state what the fact is as to whether or not sometime in 1950 there was some work done at the PFE that was contracted to an outside electrical firm?

A. When the car shops were built, that was

(Testimony of Hubert Branam.)

under contract to put in the pole line through the car shop yards, transformers, station lights, and motor control equipment.

Q. Did the Union Pacific Railroad Company do that work?      A. They did not.

Q. Do you know who did?

A. I know who the sub-contractor was for the main contractor.

Q. Who was it?

A. The Strand Electric Company.

Q. I believe that you testified yesterday that you started to work for the Pacific Fruit Express Company in 1921, is that correct? [420]

A. That is correct.

Q. Where are the headquarters of the Pacific Fruit Express Company?

A. At San Francisco.

Q. And do you know where the headquarters of the Union Pacific Railroad Company are?

A. Yes, sir.

Q. Where?      A. At Omaha.

Q. Can you tell us briefly just what business the Pacific Fruit Express Company is engaged in?

A. Yes, sir, car line operator.

Q. And what services, if any, does the Pacific Fruit Express Company perform for the railroads?

A. They furnish cars and protective service for perishable commodities.

Q. You mean refrigerator cars?

A. That is right, refrigerator cars, and we ice

(Testimony of Hubert Branam.)

them or furnish heater service, whichever is required.

Q. Are those cars which you refer to, are they Pacific Fruit Express cars?     A. Yes, sir.

Q. Do you know whether or not the railroad company has any refrigerator cars?

A. I understand that they do not. [421]

Q. Can you tell us whether or not the Pacific Fruit Express Company performs similar services for other railroads other than the Union Pacific?

A. Yes, sir. \* \* \* \* \*

Q. What other railroads?

A. The Southern Pacific, the Western Pacific, and we furnish cars and ice for the Railway Express Company.

Q. What states does the Pacific Fruit Express company operate in, can you tell us?

A. I could tell you some of them, I may not be able to name them all without making a list,—there's Washington, Oregon, Idaho, Utah, Wyoming, Nebraska, Missouri, Kansas, [422] Texas, Arizona and California, there may be others that I have missed, I don't remember whether that covers all of them or not.

Q. Is that in the performance of the same service that you testified is given to the Union Pacific?

A. Yes, sir.

Q. Here at Pocatello, what departments does the Pacific Fruit Express have?

A. The ice plant which is known as the refrigeration department, the car department, repairing



(Testimony of Hubert Branam.)

cars and the store department which furnishes materials.

Q. Does each department have a head man or manager? A. Yes, sir.

Q. And they are Pacific Fruit Express men?

A. Yes, sir.

Q. Do you know where those officers,—who they report to or who they work under?

A. Yes, sir.

Q. State whether or not they are Pacific Fruit Express officers?

A. Yes, they are Pacific Fruit Express officers at San Francisco.

Q. Do any of these departments make reports to the railroad company?

A. The ice plant does not, I don't think that the others do, that is, to the best of my knowledge.

Q. Does the railroad officers, let us say here in Pocatello, undertake to dictate or supervise or control any of the work out here at either of the departments that you have mentioned?

A. No, sir.

Q. Now finally, Mr. Branam, can you tell me whether or not the business of the Pacific Fruit Express Company here is conducted through Pacific Fruit Express Company's own officers and agents?

A. Yes, sir, that is the only ones I take any orders from.

Mr. Anderson: That is all.

(Testimony of Hubert Branam.)

Cross Examination

Q. (By Mr. Davis): Mr. Branam, you talked about the generators and electrical equipment,—after you take the electricity from the Union Pacific, in addition to the transformers in the sub-station you have a number of transformers inside the yard or the ice plant?

A. Yes, adjacent to the ice plant, not inside.

Q. But they are inside of the other enclosure, where the ice plant is? A. Yes, sir.

Q. And they are separate from the sub-station?

A. Yes, sir. [424]

Q. And you do not take any electricity or energy or voltage from this sub-station that is shown on Exhibit No. 20 until it is reduced to 2300 volts, do you? A. That is correct.

Q. You are an officer,—you do have an official position with the Pacific Fruit Express?

A. Yes, in the operating department.

Q. Now, you testified about the railroads,—you know, don't you that the Pacific Fruit Express is an operating company called a car company and that it is owned and controlled by the Union Pacific Railroad Company and the Southern Pacific Railroad Company, do you not?

A. I understand that they own it jointly.

Q. And you know that the number, the telephone number of the Pacific Fruit Express is 268 on the exchange, don't you?

A. That is correct.

Mr. Davis: That is all.

Mr. Anderson: That's all. The defendant rests, your Honor. \* \* \* \* \* [425]

Mr. Davis: We rest, your Honor.

The Court: The jury may retire.

(In the absence of the jury.)

The Court: Mr. Anderson, you have a motion, I believe.

Mr. Anderson: Yes. May it please the Court, the defendant, at the close of all of the evidence, both sides having rested, moves the Court to instruct the jury to return a verdict in favor of the defendant and against the plaintiff, for the following reasons:

That the evidence is wholly insufficient to establish any negligence on the part of the defendant. The evidence shows, without dispute or at least it is wholly insufficient to show that the Railroad Company defendant either owned, operated or controlled the sub-station or the line leading to it from across the tracks. These were all under the exclusive jurisdiction and control of the Pacific Fruit Express Company. The plaintiff LaVerl Johnson was a Pacific Fruit Express Company employee and was ordered to go into the sub-station by his superior officer, also of the Pacific Fruit Express Company, without any knowledge on the part of the defendant. The evidence shows that the sub-station performed its function as a sub-station and that there was nothing defective about it [429] and that the injuries to the plaintiff LaVerl Johnson was caused wholly and entirely by the method or the manner in which the sub-station was operated by

the officers or the employees of the Pacific Fruit Express Company; that LaVerl Johnson was let into the sub-station by the PFE officer who apparently told him that the power was off, when as a matter of fact, it had only been turned off to the transformers and the switches to turn off the power to the lightning arresters had not been disengaged. If that had been done or if H. O. Johnson had properly supervised the work of LaVerl A. Johnson, the accident would not have occurred. All that the defendant did was to furnish electrical energy to the sub-station over a line owned by the Pacific Fruit Express Company, which is wholly insufficient to establish any negligence on the part of the defendant for the injuries to Mr. Johnson. That the acts of Mr. Howard O. Johnson of the Pacific Fruit Express Company, and the manner and method in which the sub-station was operated, constituted the intervening and efficient cause of this accident. Even assuming that there might be negligence on the part of the Railroad Company, which we certainly do not admit, because the evidence does not establish that we either owned, controlled or operated the sub-station or had anything to do with it, it was on premises leased to the Pacific Fruit Express Company which [430] had exclusive control of the premises and we had no right there except by their invitation. The Pacific Fruit Express Company and the Union Pacific Railroad Company are separate and distinct corporations, each functioning in its own proper way and the defendant is not liable for any acts on the

part of the Pacific Fruit Express Company, its agents, servants or employees. Further that on the day of the accident no one of the Railroad Company, and the evidence is clear, had any evidence or knowledge that Mr. Johnson was going into the sub-station, neither did the Railroad Company have knowledge that the sub-station would be open to anyone or to Mr. LaVerl Johnson, and the Railroad Company had no keys,—they were entirely in the possession of the Pacific Fruit Express Company officers and no one on the Railroad knew of the accident or what had happened until sometime after the accident, probably the next day, I think the evidence shows.

The Court: In view of the rule which permits the Court to consider this question again if necessary, the motion will be denied at this time. I will ask counsel to come into my chambers. Mr. Bailiff, will you call the jury.

(In the presence of the jury.)

The Court: Ladies and gentlemen of the [431] jury, we are going to recess at this time until 12:45 and I will ask you to meet me at that time, you will remember the hour, 12:45.

November 25, 1953, 12:45 p.m.

The Court: Mr. Reporter, the record may show that counsel were advised by the Court as to the instructions, now, gentlemen, you may proceed with your argument.

(Arguments of counsel.)

## INSTRUCTIONS OF THE COURT

Ladies and Gentlemen of the Jury:

It becomes my duty as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the instructions which I will state to you.

You shall consider the instructions as a whole and not pick out any particular instruction and place undue [432] emphasis on such instruction.

You will also disregard any statement made by counsel on either side which is not sustained by the evidence, and any evidence which may have been offered on either side and not admitted by the Court, and any evidence which after its admission was stricken by the Court. You will remember that certain evidence was stricken by the Court. I must call your attention to the fact that one of the attorneys commented on the testimony of one witness that was stricken by the Court. This comment should not have been made because it called your attention to the fact that this witness testified to certain matters, and that, having been stricken by the Court and counsel having asked me to instruct you to disregard it, this statement should not have been called to your attention again.

The statements of the attorneys in this case, made

at the trial and in their arguments are not evidence and should not be considered by you as such.

Your verdict must be based upon the evidence. In arriving at it you should not discuss or consider anything in connection with this case except the evidence received in the trial.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the [433] parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

This is an action brought by the plaintiffs, LaVerl and Joleen Johnson, husband and wife, against the defendant, Union Pacific Railroad Company, wherein the plaintiffs seek to recover damages by reason of certain allegations of their complaint.

The pleadings here are made up of the complaint of the plaintiffs and the Answer of the defendant. These pleadings, or the allegations and denials contained therein, are not to be considered in any manner as evidence, as they are simply a statement of what each party claims, and if I may have your attention for a short time I will tell you very briefly what the parties claim here by their pleadings.

Plaintiffs are residents of the state of Idaho and the defendant is a corporation duly authorized to do business in the state of Idaho. Plaintiffs allege that on or about November 4, 1950, at 2:30 o'clock in the afternoon, plaintiff LaVerl Johnson received

injuries by reason of the negligence, carelessness and disregard of his rights by the defendant in the furnishing of electrical energy and in the operation of an electrical sub-station [434] located in the city of Pocatello, Bannock County, Idaho. That by reason of this the plaintiff LaVerl Johnson was so burned, and maimed by electrical energy as to require the amputation of both of his legs at the knee and his right arm at the shoulder socket. That the said plaintiff was otherwise injured by reason of the extreme shock to his entire nervous system resulting from electrical energy and the amputations. That said plaintiff at the date of the accident was an able bodied man of twenty-three years, earning approximately \$300.00 per month; that by reason of the actions of the defendant, plaintiff has suffered permanent and lasting injuries, and a total loss of income, all to plaintiffs' damage in the sum of \$300,000.

Defendant has filed its answer by which it admits that LaVerl Johnson was injured, but denies each and every allegation as to its negligence in any of the matters charged, or at all, and alleges that Plaintiff received his injuries in the course of his employment solely with the Pacific Fruit Express.

The defendant, Union Pacific Railroad Company, alleges as an affirmative defense that any injuries sustained by the plaintiff were caused in whole or in part, or were contributed to by the negligence or fault or want of care of the said plaintiff, LaVerl Johnson, and not by any negligence or fault or want of care on [435] the part of the defendant.



The defendant also affirmatively alleges that the work in which plaintiff was engaged at the time and place of the occurrence complained of in his complaint, had certain risks incident thereto which was obvious and well known to plaintiff, LaVerl Johnson, at all the times he was engaged in said work and also when he first entered thereon, and those risks were assumed by him and whatever injuries and illness he received in doing the said work, and which are complained of by the plaintiffs herein, arose from and were caused by those risks thus assumed by him.

I caution you again any statement that I have made here is not evidence but simply a recitation of what the parties claim.

The plaintiff and defendant come into Court as equals and you should treat them as such. The fact that one of the parties is a corporation and the other individuals should make no difference to you and you will in your deliberations not allow sympathy to sway you in the least. Sympathy has no place in the trial of a lawsuit, you will arrive at your verdict from the evidence submitted to you from the witness stand and the instructions given you by the Court. [436]

In passing upon the issues in this case, you will bear in mind that the burden is upon the one who asserts the existence of a fact to establish it, and in a civil suit such as this, to establish the fact by a preponderance of the evidence. By a preponderance of the evidence is not necessarily meant a greater number of witnesses, but a greater weight

of the evidence. That is the meaning of the word 'preponderance'—evidence which convinces you that the truth lies upon this side or that side; evidence which is more convincing and more persuasive. In this case the burden is upon the plaintiffs in the first instance to show by a preponderance of the evidence that the defendant was negligent as charged in the complaint, and that the alleged damages suffered by plaintiffs, LaVerl and Joleen Johnson, as a result of the injury to LaVerl Johnson, were by reason of and because of the alleged negligence of the defendant, Union Pacific Railroad.

"Negligence" is the failure to exercise reasonable and ordinary care, and by the term "reasonable and ordinary care" is meant that degree of care which an ordinarily careful and prudent person would evercise under the same or similar circumstances or conditions. Negligence consists in the doing of some act which a reasonably prudent [437] man would not do under the same or similar circumstances, or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances and conditions. Negligence is never presumed, but must be established by proof the same as any other fact in the case.

"Ordinary" or "reasonable" care are relative terms, and such care is proportionate to, and commensurate with, the danger involved. In other words, the greater the danger involved, the greater

is the care required, although there is but one standard of care, and that is reasonable or ordinary care, as defined in this instruction.

The defendant has asserted as an affirmative defense that the plaintiff, LaVerl Johnson, was negligent and that such negligence was the proximate cause of the accident. In other words, the defendant has charged that said plaintiff was guilty of contributory negligence. Regarding contributory negligence, I will say that it is called contributory negligence because it is charged to be the negligence of the person upon whose behalf or through whom the original claim is being made. The same definition applies to contributory negligence as applies to negligence, which I just defined to you. [438] In considering the matter of contributory negligence you should take into consideration the conditions as they existed at the time of the accident, the experience of the person charged with the contributory negligence, and his ability to reason and distinguish between acts that would be negligent and those which would not be negligent. If you find such negligence on the part of the plaintiff, LaVerl Johnson, and that such negligence was the proximate cause of the accident or directly contributed to the plaintiff, LaVerl Johnson's injuries, plaintiffs cannot recover even though you may find from the evidence that the defendant was also negligent.

The defendant can be held liable only for such negligence as constituted the proximate cause in whole or in part, of the injuries complained of.

In order for the plaintiffs to recover, it must be proved to your satisfaction, by a fair preponderance of the evidence, that defendant's negligence was the proximate cause in whole or in part of the injuries complained of.

The question always is: Was there an unbroken connection between the wrongful act, if any, and the injury? In no event can damages be allowed except such as resulted directly from the negligence of the defendant. [439]

The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new independent cause, produces the injury, and without which the injury would not have occurred.

If you find from the evidence that the defendant was negligent as charged, then the burden is upon the negligent defendant to prove by a preponderance of the evidence that the contributory negligence of the plaintiff, LaVerl Johnson, was the proximate cause of the accident.

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

The plaintiff has asserted as a further affirmative defense that the plaintiff, LaVerl Johnson, assumed

[440] the risks incident to his employment and that the defendant cannot be held liable for an accident occurring during the course of assuming those risks. Any employee does assume certain risks in connection with his employment, and in determining whether he assumes certain risks the question is not whether he actually observed and consciously assumed all of the risks involved, but whether the risks were such that they naturally grew out of the work in which he was engaged. If the risks were of such a nature that he could have understood and appreciated them, if he had used ordinary care, taking into consideration his age, intelligence and experience, then they were of such a character that he assumed them.

In considering the question of contributory negligence and assumption of risk on the part of the plaintiff. LaVerl Johnson, you are instructed that it is a generally accepted theory of the law that one's natural instinct is to preserve and protect himself from injury whenever possible and that it is unreasonable to suppose that a person would deliberately place himself in a position of danger if such danger were known or should have been known to him. In an action such as this, the presumption which arises in favor of the instincts of self-preservation and the known disposition of men to avoid [441] injury or personal harm to themselves constitutes a prima facie inference that the person injured was at the time in the exercise of ordinary care, and was himself free from contributory negligence, and the law presumes, unless the

contrary is shown, that such injured person exercised the measure of care which it was his duty to exercise. This presumption which arises in favor of self-preservation and the known disposition of men to avoid injury to themselves is rebuttable, and it is for you, the jury, to determine in this case whether or not that presumption has been overcome by the evidence.

In this case the defendant Union Pacific Railroad Company is a corporation and so is the Pacific Fruit Express Company a corporation, each are separate and function in their own proper ways, neither is liable for the acts of the other.

The general rule of law is that where one furnishing and supplying electricity for a valuable consideration, merely transmits its electrical current from its line to the consumer's wires, which it did not install, and does not control, it has no duty to inspect such wires and is not liable for injuries caused by defects in them. However, [442] where the company knows of any defects or by the exercise of ordinary care required of a company dealing in electricity, would know of such defects, its duty is to stop and not to send its deadly current to the defective appliances or equipment of the consumer or to and through defective electrical apparatus and it is liable for injuries to person or property caused by a breach of this duty.

Since electrical energy is one of the most destructive agencies, those engaged in its generation or distribution are held to the exercise of and are

required to exercise the highest degree of care and diligence to avoid injuries to persons who might lawfully but accidentally or otherwise come in contact with its wires carrying electricity. One engaged in the distribution of electrical current must exercise that degree of care which a reasonably prudent and careful man who is conscious of the dangerous and destructive character of the agency under his control and conscious also of the likelihood of injury under conditions and circumstances at a particular place, would at that place and under the same conditions and circumstances evercise to prevent injury. [443]

With respect to knowledge on the part of an agent which may be imputed to his principal, the law is that relevant knowledge may be acquired by an agent, either before the time of his employment or after he becomes agent. The important matter is not how the agent acquired the knowledge, but whether or not he had the knowledge when it became relevant in his work for the principal. If the agent has the information in mind at the time it becomes relevant in his work, the principal is bound equally where the knowledge was acquired privately by the agent as where he obtained it while acting as such agent. Therefore, where the agents of a company supplying an electric current had or should have had knowledge of a hazardous and dangerous condition of wiring and appliances maintained by a customer, and continue to furnish such current with such knowledge, if injury occurs by reason of such hazardous conditions the company

is liable for injuries occurring as the proximate result of furnishing such current.

You should not concern yourself with the negligence or lack of negligence on the part of the Pacific Fruit Express Company for that company is not a party to this action, unless you find that the negligence of the Pacific Fruit Express Company was the sole and only [444] negligence and that from the facts the Union Pacific Railroad Company was in no wise involved in proximately causing the injuries to the plaintiff LaVerl Johnson.

Every person or corporation, furnishing electrical energy for pay, shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable.

It was the duty of the Union Pacific Railroad Company to comply with this rule.

There has been a great deal of testimony given in this case by opinion witnesses, or expert witnesses. An opinion witness, or expert witness, is one who has testified that he has sufficient knowledge concerning the subject matter through study, training, observation and experience, to permit him to give his opinion. Where the testimony of such witness is as to anything that can be observed and seen by any other witness, his testimony is to be viewed as that of any other witness, giving consideration to any particular training and experi-



ence [445] he may have as to any bearing it may have on any increased accuracy on his part over that of a person of ordinary experience. Insofar as his testimony is an expression of opinion based upon facts in the case shown by the evidence, you must, before considering the weight of the opinion of such witness, first find from the evidence that the facts upon which his opinion is based are true. The mere fact that the testimony was offered by an expert does not compel you to take that testimony in preference to any other. You are not bound by any opinion testimony, and it should be considered by you in connection with all the other evidence and should be given such weight as you believe it is entitled to receive.

If from a preponderance of the evidence, you believe that at the time of the alleged injury to LaVerl Johnson, the defendant, Union Pacific Railroad Company, was furnishing electricity to the Pacific Fruit Express Company for a valuable consideration and that the said Union Pacific Railroad Company was advised of or by the exercise of ordinary care the Union Pacific could have and should have known of the conditions that existed at the sub-station on the date of the accident, and you further find that such conditions were dangerous and [446] hazardous to life and property and that the Union Pacific Railroad Company continued to furnish high voltage electricity through said lines and into said sub-station and that as a proximate cause thereof LaVerl Johnson was injured, then the defendant was negligent.

It has been stipulated and agreed between the parties that from the experience of men, a man of LaVerl Johnson's age at the date of the injury would probably have a life expectancy of 40.17 years from that date, and the jury is entitled to take this into consideration on the question of the probable length of life of LaVerl Johnson and as tending to show ordinary experience in like cases.

You are instructed that in the event you should find from all of the evidence that the Defendant Union Pacific Railroad Company was negligent and that its negligence was the proximate cause of the injuries to LaVerl Johnson and you otherwise find from the evidence and from these instructions that the plaintiffs are entitled to recover, then in considering and fixing the amount of damages you may take into consideration as may be shown by the evidence the health of the plaintiff [447] LaVerl Johnson at the time he received the alleged injuries, his probable life expectancy, his earning capacity at the time, the effect of the injuries upon his future earning capacity, as well as the actual loss of earnings to the date of trial, together with the probable future medical expense that LaVerl Johnson may be required to expend by reason of the injuries and the effect of such injuries on said LaVerl Johnson's ability to enjoy a normal, healthy life and participate in the normal human affairs. You may also take into consideration the humiliation and disfigurement, if any, caused by such injuries. You may also in addition to the matters heretofore mentioned, consider the pain and suffer-

ing which LaVerl Johnson may have suffered as shown by the evidence, together with the pain and suffering, if any, which he may suffer in the future and during the remainder of his lifetime. In other words, you are entitled to fix damages based upon the loss and pain and suffering which LaVerl Johnson by reason of the alleged injuries may have suffered both present and future, and in so fixing such damages you should take into consideration all of the facts and circumstances as shown by the evidence, in such a manner as to do justice between the parties.

In no event should you find for the plaintiff in an amount greater than that prayed for in the complaint. [448]

You are instructed that the Union Pacific Railroad Company at the time of the alleged injuries to LaVerl Johnson was chargeable with knowledge of the effect upon a human being if contact was had between the wire or wires carrying voltage (of at least 12,000 volts) and a human being.

If, after deliberating on this matter, you determine that the plaintiff is entitled to recover, you should determine the amount by an open and frank discussion among your members and you should not arrive at any amount to be allowed, by each stating the amount you think should be allowed, then adding the several amounts together and dividing the total by twelve or by the number taking part in such method. This would be a quotient verdict and you should not, under your oath as jurors, arrive at any such verdict in such manner.

The fact that the Court has instructed you upon the rules governing the measure of damages is not to be taken by you as any indication on the part of the Court that it believes or does not believe that the plaintiff is entitled to recover damages. This instruction is given you solely to guide you in arriving at the amount [449] of your verdict only in the event that you find from the evidence and instructions given you by the Court that the plaintiff is entitled to recover. If, from the evidence and instructions, you find that the plaintiff should not recover, then you will disregard entirely the instructions that have been given you concerning the measure of damages.

In passing upon the questions of fact in this case, you will determine the credibility to be given the testimony of each witness and you have a right to take into consideration his interest, if any, in the result of the case, his demeanor on the witness stand, his candor or lack of candor, and all other facts and circumstances which would influence you in determining whether or not a witness has told the truth. You will determine the weight to be given to the testimony of each witness called to the stand.

If you believe from the evidence that any witness has wilfully sworn falsely in his testimony in this trial, regarding any material matter testified to by such witness, then you may totally disregard the testimony of such witness except insofar as he is corroborated, to [450] your satisfaction, by other

and credible evidence, or by facts and circumstances proved on the trial.

There has been some mention made in this case regarding Workmen's Compensation. You are instructed that Workmen's Compensation has nothing to do with the questions which concern you and that you are not to consider Workmen's Compensation with respect to this case and to your findings in any manner whatsoever.

You are instructed that in considering this case you must disregard any indemnity provisions contained in any of the contracts and leases between the defendant and the Pacific Fruit Express Company. This is a matter with which you are not concerned.

You have been told earlier in this trial but I think I should mention it again that you were not concerned with the Statute of Limitations as it pertains to the plaintiffs' right to bring this action. I think I should remind you again that this matter has been disposed of and you will not concern yourselves with that question, in your deliberations.

In this Court it is necessary that you all agree in arriving at a verdict. When you retire you will first elect one of your number as foreman and when you have agreed upon a verdict your foreman alone will sign the verdict. Forms of verdict have been prepared for your use and you will have no trouble in using the form which will correctly reflect your finding. You will see that one form contains a blank space for the amount of damages you allow, if any, if you find in favor of the plaintiff

against the defendant; another form will be given you on which there is no blank space in case you find for the defendant and against the plaintiff.

When you arrive at a verdict it will be returned into open court.

It will be necessary for me to take up a matter of law with counsel. You will be excused for a moment and I will call you back.

(In the absence of the jury.)

The Court: Does the plaintiff have any exceptions to record to the instructions?

Mr. Davis: Just the one instruction, where the Court instructed the jury that they should pay no attention to anything in reference to indemnity in this case. That, we agree is the law in so far as the [452] amount of any verdict is concerned but that question was asked to show the interest of the witness on the stand and the Court allowed the exhibits in for whatever they were worth and that amounts to striking those provisions out and we feel it should only be considered by them in so far as the examination of the witness was concerned to test the credibility as to whether the Company did or did not have a financial interest.

Mr. Casterlin: I call the attention to the fact that these were read without any limitation whatever, and went in without limitation.

The Court: You may record your objection.

Mr. Anderson: I have some here, but I am not sure that I have the right pages. May I see the instructions.

The Court: No, I never permit that. I have the instructions I did not give here.

Mr. Anderson: If the Court please, the defendant excepts to the instruction given with reference to where the defendant knew of defects and the general duty to stop power and cut off power where there was such a defect. My exception to that is that it might be good if applied to certain facts but it is not justified under the facts in this case because there were no defects in the sub-station.

Then, we except to the instruction which started out with knowledge on the part of an agent and then wound up with where there was a hazardous and dangerous condition and the railroad knew about it that it would be liable for furnishing power. Now we except to that because the facts are that there was nothing more hazardous or dangerous about this substation than would exist at any sub-station if it had been properly operated. In other words there is a difference between dangerous and defective condition.

The defendant excepts to another instruction with reference to furnishing electricity where it was advised or knew of the dangerous and hazardous condition for the same reason assigned to the last one.

Now, if the Court please, we would like to except to the failure of the Court to give defendant's requested Instruction Number 1 for the reasons set forth in our motion for directed verdict.

The defendant excepts to the failure to give that part of our requested Instruction Number 2 with

reference to the law that the mere fact of injury does not, and is not sufficient to establish liability.

The Court: Do you have in mind the instruction that I gave on that.

Mr. Anderson: I am not sure I caught that. [454]

The Court: I instructed the jury "In law we recognize what is termed as unavoidable or inevitable accident." These terms do not mean literally that it was not possible for such an accident to have been avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

Mr. Anderson: I remember that but I didn't think it covered the mere fact of an injury. Now, I am not certain about this, but I think if I may I would like to take exception to the refusal of the Court to give our requested Instruction Number 6.

The Court: I will require you to give your reason, Mr. Anderson.

Mr. Anderson: Instruction Number 6 was to the effect that if you find from the evidence that after the sub-station was constructed, it was turned over and accepted by the P F E and was owned, operated and controlled and so on by the P F E, then by merely furnishing electricity the Railroad Company would not be liable or responsible under the facts here. That seems to me to be the law and



I think this instruction was not given, [455] nor was it otherwise given.

Now, as to Instruction Number 7, our requested Number 7, which has to do with the failure of the P F E employees to pull the switch or switches or warn LaVerl Johnson. We except to that for the reason that it is in accordance with the facts and it is according to the law in the cases we cite, especially the case in 10 Fed. 66.

The defendant excepts to the refusal to give our requested Number 8 which relates to the method of operation as having been the cause of the alleged injury and damage and if the jury did so find that it would be an independent and intervening cause, hence the proximate cause. This is also in accordance with the law as covered by the cases cited.

Defendant excepts to the refusal of the Court to give our requested Instruction Number 10 which relates to the outmoded and somewhat obsolete condition of the sub-station, and if the jury found that the method of operation was the cause of the injury then the plaintiff would not be entitled to recover here, and I can refer again to the case cited on our requested Number 8. We think it is the law and it is also according to the facts here.

I am not sure that I gave you in Chambers our Instruction Number 11—

The Court: No, you didn't, I have only [456] 7, 8 and 10.

Mr. Anderson: The defendant would also like

to take an exception to the refusal of the Court to give our special interrogatory.

(The following in the presence of the jury.)

The Court: Ladies and gentlemen of the jury, it is a little hard to give you as many instructions as I have in this matter without counsel feeling that I have not explained them as fully as I should. The Court is liable to make too positive a statement at times. I did instruct you to not pay any attention to the indemnity clause in the contract. I should have said, "as to whether that proved any issue in this case." I permitted this indemnity clause to be introduced in evidence only for the purpose of showing you the interest of the witness for the Pacific Fruit Express.

Now, there is no question in this case but what LaVerl Johnson was injured and I think it is plain that you know how he was injured. Now, as to the Pacific Fruit Express, none of their acts are to be charged against the Union Pacific. I have given you instructions as to the duty of the Union Pacific under the distribution of electricity in any place such as at this station which was hazardous or defective. I don't want you to be confused [457] at all in bringing this Pacific Fruit Express into this case as to their acts in pulling the switches or anything of that nature. I instructed you fully as to the liability of the Union Pacific in placing their power in this sub-station and you are not to tie acts of the Pacific Fruit Express in with those in any way.

I instructed you as to what action you should

take in case the conditions at the sub-station were dangerous or hazardous. This is a question for you, that is, whether the conditions were dangerous and hazardous and if you find that there was no hazardous or dangerous condition then you, of course, would pay no attention to the instruction along that line.

Now, you may retire again for a few minutes.

(The following in the absence of the jury.)

The Court: Does the plaintiff feel that I have covered the matter?

Mr. Davis: Yes, your Honor.

The Court: Do you have any further objection?

Mr. Anderson: I have no further objections.

The Court: You feel that I have fully covered the matter; if you don't, then I will call them back.

Mr. Anderson: I didn't feel or rather it didn't seem to me that it had been covered when your Honor told them they should not tie the Pacific Fruit Express into this.

The Court: I also told them that in any action such as their pulling the switches or anything of that nature that the Union Pacific should not be held responsible for any of their acts.

Mr. Anderson: I think it is all right.

The Court: You are satisfied.

Mr. Anderson: Yes.

The Court: Mr. Bailiff, you may recall the jury.

(The following in the presence of the jury.)

The Court: The alternate jurors may be excused at this time and I want to thank you for the atten-

tion you have paid here and for helping us out by standing by. The bailiffs will be sworn.

(Whereupon, the bailiffs were sworn by the clerk.)

The Court: The jury may now retire to consider their verdict.

[Endorsed]: Filed March 29, 1954.

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[Endorsed]: No. 14498. United States Court of Appeals for the Ninth Circuit. Union Pacific Railroad Company, a Corporation, Appellant, vs. LaVerl Johnson and Joleen Johnson, Husband and Wife, and Pacific Fruit Express Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed: September 2, 1954.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14498

UNION PACIFIC RAILROAD COMPANY, a  
Corporation, Appellant,

vs.

LaVERL JOHNSON and JOLEEN JOHNSON,  
Husband and Wife, Appellees,  
PACIFIC FRUIT EXPRESS COMPANY, a Cor-  
poration, Appellee.

### STATEMENT OF POINTS

Comes now the Union Pacific Railroad Company and files its Statement of Points on which it will rely on the appeal in this matter.

#### I.

The court erred in refusing to direct a verdict in favor of the Union Pacific Railroad Company for the reasons stated in its Motion for Directed Verdict.

#### II.

The court erred in refusing to grant the Motion of the Union Pacific Railroad Company for Judgment Notwithstanding the Verdict for reasons set forth therein and for reasons set forth in its Motion for Directed Verdict.

#### III.

The court erred in permitting the plaintiffs' witness Elmer V. Smith to testify, over defendant's

objection, to the duty of one furnishing electricity, for the reasons stated in said objection.

#### IV.

The court erred in giving the second sentence of the instruction set forth in paragraph X of defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, for the reasons therein set forth.

#### V.

The court erred in giving the fourth and last sentence of the instruction set forth in paragraph XI of defendant's Motion for Judgment Notwithstanding the Verdict and For a New Trial, for the reasons therein set forth.

#### VI.

The court erred in giving the instruction set forth in paragraph XII of defendant's Motion for Judgment Notwithstanding the Verdict and For a New Trial, for the reasons therein set forth.

#### VII.

The court erred in refusing to give defendant's requested instruction No. 1, directing the jury to return a verdict in favor of the Union Pacific Railroad Company.

#### VIII.

The court erred in refusing to give defendant's requested instruction No. 6 set forth in paragraph XIII of its Motion for Judgment Notwithstanding the Verdict and For a New Trial, for the reason

that the instruction correctly stated the law and was not otherwise given.

IX.

The court erred in refusing to give defendant's requested instruction No. 7 as set forth in paragraph XIV of its Motion for Judgment Notwithstanding the Verdict and For a New Trial, for the reason that the instruction correctly stated the law and was not otherwise given.

X.

The court erred in refusing to give defendant's requested instruction No. 8 set forth in paragraph XV of its Motion for Judgment Notwithstanding the Verdict and For a New Trial, for the reason that the instruction correctly stated the law and was not otherwise given.

XI.

The court erred in refusing to submit to the jury defendant's Special Interrogatory No. 1 as set forth in paragraph XVI of its Motion for Judgment Notwithstanding the Verdict and for a New Trial.

XII.

The court erred in refusing to grant defendant's Motion for a New Trial for the reasons set forth herein, and for the following additional reasons:

(a) That the evidence is wholly insufficient to justify the verdict for the reasons set forth in paragraph II of defendant's Motion for New Trial.

(b) That the verdict is grossly and monstrously excessive.

(c) That the verdict is grossly and monstrously excessive and appears to have been given under the influence of passion, prejudice, caprice, or sympathy, and shocks the sense of justice and shows an utter disregard for the instructions of the court.

XIII.

That the verdict is against the law for the reasons set forth herein.

XIV.

That the evidence is wholly insufficient to support the judgment entered on the verdict for the reasons set forth herein, and for the reasons set forth in paragraph II of defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, and for other reasons therein set forth.

Dated, September 7, 1954.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. C. PHOENIX,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed September 8, 1954. Paul P. O'Brien, Clerk.



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No. 14498

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNION PACIFIC RAILROAD COMPANY,  
a Corporation,

*Appellant,*

vs.

LaVERL JOHNSON and JOLEEN JOHNSON,  
Husband and Wife, and PACIFIC FRUIT EXPRESS  
COMPANY, a Corporation,

*Appellees.*

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## Brief of Appellant

UNION PACIFIC RAILROAD COMPANY

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Appeal from the United States District Court for the  
District of Idaho, Eastern Division

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FILED

JAN 10 1955

PAUL P. O'BRIEN  
CLERK



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No. 14498

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNION PACIFIC RAILROAD COMPANY,  
a Corporation,

*Appellant,*

vs.

LaVERL JOHNSON and JOLEEN JOHNSON,  
Husband and Wife, and PACIFIC FRUIT EXPRESS  
COMPANY, a Corporation,

*Appellees.*

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## Brief of Appellant

UNION PACIFIC RAILROAD COMPANY

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Appeal from the United States District Court for the  
District of Idaho, Eastern Division

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No. 14498

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNION PACIFIC RAILROAD COMPANY,  
a Corporation,

*Appellant,*

vs.

LaVERL JOHNSON and JOLEEN JOHNSON,  
Husband and Wife, and PACIFIC FRUIT EXPRESS  
COMPANY, a Corporation,

*Appellees.*

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## Brief of Appellant

UNION PACIFIC RAILROAD COMPANY

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### STATEMENT OF THE CASE

On the 20th day of March, 1953, appellees LaVerl and Joleen Johnson instituted this action against the appellant Union Pacific Railroad Company for damages arising out of personal injuries sustained by LaVerl Johnson on November 4, 1950, while employed by the Pacific Fruit Express Company at Pocatello, Idaho. Said appellees claimed the appellant was negligent in the furnishing of electrical energy and in the operation of an electrical substation in the City of Pocatello. Johnson's injuries resulted in the loss of both legs below the knees and the loss of his right arm near the shoulder, for which appellees prayed damages in the amount of \$300,000.00 (R 4, 7).

Appellant answered denying that it was negligent or that appellees had been damaged in the sum of \$300,000.00, or in any sum whatsoever, and admitting the injury sustained by LaVerl Johnson as set forth in paragraph IV of its Answer. Appellant set up as separate defenses the statute of limitations, contributory negligence, and assumption of risk (R 9-12).

The defense of the statute of limitations was withdrawn after the trial commenced (R 110-113), and the court struck all testimony previous to that except the hospital record and testimony relating to disability, pain, suffering, humiliation, and things of that kind (R 16, 112). The case came on for trial before the Honorable Chase A. Clark, District Judge, and a jury, on the 18th day of November, 1953. At the close of all of the evidence appellant moved the court to instruct the jury to return a verdict in its favor (R 18, 363-365), which was by the court denied (R 365), following which the case was submitted to the jury the afternoon of November 25th, who returned a verdict in favor of the appellees in the sum of \$225,000.00 (R 18-19) upon which judgment was entered (R 19-20).

Thereafter appellant served and filed its Motion for Judgment Notwithstanding the Verdict and for New Trial (R 20-28), both of which were by the court on August 16, 1954, denied (R 31-35). On the same date the judgment was amended to allow the Pacific Fruit Express Company, as intervenor, to recover out of the proceeds of the Judgment the amount it has or will be required to pay appellees under the Idaho Workmen's Compensation Act (R 29-31). From



the judgments entered the Railroad Company has appealed (R 35).

## JURISDICTION

Jurisdiction of the District Court is based upon diversity of citizenship of the parties and that the amount involved, exclusive of interest and costs, exceeds \$3,000.00. Appellees are citizens of Idaho and the appellant is a citizen of Utah (R. 3). Accordingly the District Court had jurisdiction, 28 USCA 1332, and this court has jurisdiction to review the case on appeal, 28 USCA 1291, Rule 73 Federal Rules of Civil Procedure.

## QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED

1. Whether appellees established by substantial evidence that appellant was—(a) negligent in the furnishing of electrical energy; and (b) in the operation of an electrical substation (R 3-4), and if so, whether any such negligence was the proximate cause of Johnson's injuries. These and incidental questions are raised by the Answer (R 9-12), appellant's Motion for Directed Verdict (R 363-365), appellant's Requested Instruction No. 1 (R 37-38), Motion for Judgment Notwithstanding the Verdict and for a New Trial (R 20-28), and denial thereof by the trial court (R 31-35).

2. Admission of testimony of Elmer V. Smith over appellant's objection (R 22-23, 192-194).

3. Error of the court in the giving and refusing of instructions objected to at the trial (R 23-28, 382-387).

4. That the verdict is grossly and monstrously excessive, raised by appellant's Motion for Judgment Notwithstanding the Verdict and for a New Trial (R 20-28), and denied by the court (R 31-35).

5. That the verdict is against the law and the evidence is wholly insufficient to support the verdict and judgment, raised by appellant's Motion for Directed Verdict (R 363-365), Requested Instruction No. 1 (R 37-38), Motion for Judgment Notwithstanding the Verdict and for a New Trial (R 20-28), all denied by the trial court (R 31-35).

6. That the trial court should have sustained appellant's Motion for Judgment Notwithstanding the Verdict or should have granted appellant a new trial (R 20-28) instead of denying both of them (R 31-35).

## STATEMENT OF THE FACTS

Prior to March 1, 1924, the Pacific Fruit Express Company was receiving power direct from the Idaho Power Company. On March 1, 1924, the Oregon Short Line Railroad Company (not a party to this action) entered into a contract with the Pacific Fruit Express Company, Exhibit No. 26, which recites that the Idaho Power Company had agreed to furnish power to the Oregon Short Line Railroad Company at a different rate than that provided for the Pacific Fruit Express Company, and under such arrangements the Pacific Fruit Express could obtain power through the Railroad

(R 314-315). The contract then provided for the building of a substation by the Oregon Short Line Railroad Company to be paid for by the Pacific Fruit Express (R 315), and the Pacific Fruit Express agreed to pay the Oregon Short Line Railroad Company for power delivered, plus 10% for transmission line and transformer losses (R 316). In other words, this was merely permitting the Pacific Fruit Express Company to take its energy off the Oregon Short Line Railroad Batiste line and cannot be construed to mean that the Oregon Short Line Railroad Company was delivering energy to the Pacific Fruit Express Company. It was not generating power and the effect of the agreement and the evidence was as stated, that it was permitted to hook a transmission line onto the Railroad Batiste line (R 161, 354).

This line and the sub-station, pursuant to the contract, Exhibit 26, was built by the Oregon Short Line Railroad Company, the cost of which was first estimated by the Pacific Fruit Express Company, Exhibit 30 (R 250), and about June 11, 1926, the actual cost was determined Exhibit 31 (R 251), and the Oregon Short Line Railroad Company was paid for the construction of the transmission line and sub-station by the Pacific Fruit Express Company (R 252), following which the Pacific Fruit Express Company made out a completion report, Exhibit 32 (R 252). All of these Exhibits, 30, 31 and 32, definitely state that ownership of the transmission line and the sub-station was in the Pacific Fruit Express Company.

The line and the sub-station are carried in the capital or investment accounts of the Pacific Fruit Express Company,

which shows ownership in that Company (R 266), and likewise the transmission line and sub-station are not carried in the capital or investment accounts of the Oregon Short Line Railroad Company or the Union Pacific Railroad Company. This is so because the Pacific Fruit Express Company paid for them and it is the owner (R 273-274).

Mr. Hubert Branum of the Pacific Fruit Express Company accepted the sub-station and the transmission line after completion for the Pacific Fruit Express Company (R 277). Ownership of the transmission line and sub-station was by the lessor, Oregon Short Line Railroad Company, acknowledged Ex. 28 (R 332). The Pacific Fruit Express Company is also the operator of the substation, Exhibit 32 (R 264, 294, 296).

Exhibit No. 27 is a lease from the Oregon Short Line Railroad Company to the Pacific Fruit Express Company dated April 29, 1926, and provides for a transformer and transmission line site. The transformer site and the transmission line are shown in yellow on Exhibit B attached to Exhibit No. 27, and is also shown on Ex. B attached to Exhibit No. 28. Exhibit No. 29 merely enlarges the transformer site from 15x22 to 33x31 feet, and continued the rental for the right to maintain and operate the transmission line across the tracks of the railroad to the sub-station (R 336-338).

Exhibit No. 35 shows the general location of various buildings about the Ice Plant, including the sub-station (R 278), and Exhibit 36 is a diagram of the sub-station, showing in general the transformer and the rest of the equip-

ment in the sub-station (R 279-280). Exhibit 35 also shows the line from the sub-station to the Ice Plant and the line running to the top of this Exhibit from the sub-station is the 12,500 volt line from the Batiste power line over to the sub-station where Johnson was injured. This line across the tracks from the Batiste line to the sub-station only serves the sub-station and does not serve any railroad facilities (R 166, 282, 341, 345). There are disconnect switches on the pole of the Batiste line where the line to the Pacific Fruit Express Company sub-station takes off (R 283), and at the top of the sub-station there is a pole top switch which deenergizes the three transformers in the sub-station (R 162, 163, 174, 302). In addition thereto there are disconnect switches at the sub-station to the lightning arrestors (R 163, 182, 203, 208-209, 239, 286, 345).

The sub-station in question is enclosed with a high wire fence (R 123, 166), and sets out in the open, so anyone, whether employee or otherwise, can come around it, but they cannot get into it. The area of the sub-station is about 30 square feet (R 123-124, 284).

The sub-station is kept locked (R 167, 169, 284). There is only one gate in the transformer cage, and that is in the west side. There are three transformers just inside the gate. The lightning arrestors are to the east of the transformers about 15 feet (R 141, 167-168).

This sub-station was standard when built and was what is termed a package substation, either of Westinghouse or General Electric (R 236, 346). It was the latest thing in sub-

stations at the time it was built (R 236). This station on November 4, 1950, and the equipment in it, was capable of receiving safely the electrical energy being delivered to it and to operate as a sub-station should. It was as safe as the day it was built. There was nothing defective about it or any of the equipment in it, but on the day in question it was not operated safely (R 182-183, 203-205, 236-237, 344-345). Accordingly there was no reason to cut off service to it, and the witness Gilbert stated he would not have advised his employer, the Idaho Power Company, to refuse to furnish energy to it (R 238). The standards now are the same and if the station had been operated properly, the disconnect switches pulled, it would have been perfectly safe (R 239-241). It has always operated satisfactorily as a sub-station and there were no injuries prior to November 4, 1950 (R 283).

LaVerl Johnson worked at the Pacific Fruit Express Company as a repairman (R 107), and his immediate superiors were Shoup and H. O. Johnson. Shoup was Plant Manager and H. O. Johnson was Assistant Plant Manager, both of whom worked for the Pacific Fruit Express Company and not for the Railroad; all were paid by the Pacific Fruit Express Company (R 224). H. O. Johnson died prior to the trial (R 123, 140).

LaVerl Johnson went to work at the Pacific Fruit Express Ice Plant about eight o'clock A. M., the morning of November 4, 1950. He was instructed by H. O. Johnson to paint electrical cables that go into the transformer which was in the small cage in the Ice Plant, and after that, or at about noon, H. O. Johnson gave him the keys to the large trans-

former cage and instructed him to go into this cage and paint in there as he had painted the other one (R 108, 110). There were only two keys to the sub-station gate and Mr. Shoup or his Assistant had possession of both keys; the Railroad had none (R 169, 293); McClellan saw LaVerl painting taped up wires in and out of the transformers that morning in the small cage (R 140-141). LaVerl testified that when H. O. Johnson gave him the key to the large transformer there was no one else around (R 231).

After lunch, and after mixing paint, LaVerl testified that he proceeded to the large transformer cage, unlocked the gate, walked around to work from the back side to the front and took hold of a wire that had not been deenergized (R. 110). He was severely burned and as a result thereof both legs were amputated six inches below the knees and his right arm three inches below the head of the humerus. His foot prints showed that after entering the gate he turned to the left, went around the north transformer, then switched back to the east to the lightning arrestors and then south to the south arrestor (R 141-142, 167-168). He testified that the transformers were right in front of the gate and was told to paint in this transformer cage like he had painted in the small one (R 228), and while he says he did not know the difference between a transformer and an arrestor he admits the arrestor did not look the same as the transformer he was working on in the morning, but insisted several times that on the morning before the accident occurred in the afternoon he saw several men who took lids off the transformer in the large sub-station, where he was later injured, and these men

were looking down inside the transformer (215, 230). He also stated that the arrestors did not look like transformers (R. 142).

LaVerl testified that he took no orders from the Railroad and the Railroad did not tell him to paint the cables; that he took all orders from someone of the Pacific Fruit Express Company and that he went into the sub-station alone (R 231-232).

At about 9 A. M. on November 4, 1950, Mr. James E. Johnson, Howard O. Johnson, and Melvin Judge, all Pacific Fruit Express men, (Judge was the PFE electrician) went into the sub-station for the purpose of checking the oil in the transformers, and contrary to some inferences raised by appellees' witnesses, there were no Railroad electricians there and no one from the Railroad at all (R 303-304, 308-309); there were some Pacific Fruit Express laborers that went in with them to cut weeds at the same time (R 303, 309), but the Johnsons and Judge were the last ones out and the gate was locked (R 304, 309). The laborers were warned that the arrestors were not deenergized and none of them got hurt (R 310, 313). Judge knew the arrestors were not deenergized and so did James E. Johnson and Howard Johnson (R 310). While in the sub-station that morning James E. Johnson pulled the pole-top switch which disconnected the power to the transformers, but did not pull the disconnect switches to the arrestors. LaVerl Johnson, instead of painting cables leading into and out of the transformers, went back behind the transformers to the arrestors where he received his injuries.



There is no dispute about the fact that there were disconnect switches to the arrestors that could have been pulled by someone at the Pacific Fruit Express, and there was a hot stick available to do this (R 286), and if these disconnect switches had been pulled, of course, Johnson would not have been injured (R 170, 182-183, 203, 239, 286), and if this had been done the substation would have been perfectly safe (R 182, 237, 238). It was the method of operation of the sub-station by the Pacific Fruit Express that made the sub-station unsafe for LaVerl Johnson, and if the disconnect switches had been pulled there would have been no danger in the sub-station (R 183, 203, 209, 237, 239, 246).

The Pacific Fruit Express Company operates entirely independent of the Union Pacific; they are separate corporations (R 235). The Pacific Fruit Express Company is a car line operator, and furnishes cars, refrigerator and heater service to various railroads, including the Union Pacific Railroad Company (R 359-361). The Pacific Fruit Express officers at Pocatello report to the Pacific Fruit Express officers in San Francisco, none of whom work for the Railroad, and no reports are made by the Pacific Fruit Express officers or employees to the Railroad (R 294-295, 360-361). The Pacific Fruit Express operates the sub-station (R 294), and no one from the Railroad has ever operated it, and no one from the Railroad has ever pulled the disconnect switches. Shoup and his Assistant has authority to pull them (R 295). Shoup did testify that at the time of the accident he thought the pole-top switch deenergized all power in the sub-station, but he had been Plant Manager at the Plant only since Septem-

ber 1, 1949 (R 292). However, Mr. Branum, Superintendent, had been here from the time the sub-station was first constructed; he knew about the switches (R 286); so did James E. Johnson, who pulled the pole-top switch the morning of the accident but did not pull the disconnect switches to the arrestors (R 304), and neither did Judge, who was the Pacific Fruit Express electrician (R 308, 310). Both of them knew what work was to be done (R 303, 308). Even they did not anticipate that later LaVerl Johnson was to be sent into this cage alone, or that he would endeavor to paint a bare wire on the lightning arrestor after having been instructed to paint taped up leads to or from the transformers. There were no Union Pacific electricians at the substation since Shoup has been Plant Manager there (September 1949) (R 292-293); but when they are called Mr. Shoup instructs them what to do. Union Pacific electricians have never changed any transformer oil—the Pacific Fruit Express does it (R 293-294, 346).

Union Pacific electricians all work for the Union Pacific, not for the Pacific Fruit Express (R 341, 346). The only time they do work for the Pacific Fruit Express is when someone from the Pacific Fruit Express calls them. They did some work in 1948 and 1949, and did the work shown on Exhibit 33 (R 257-259), for which the Pacific Fruit Express paid the Railroad. The Union Pacific electricians have no keys to the sub-station, and as a matter of fact did not work on Saturday, November 4, 1950 (R 343). The Union Pacific electricians have no duties to perform in the sub-station (R 350), and no one from the Pacific Fruit Express, or other-

wise, called the Railroad electricians on Saturday, and the lead electrician did not know of the accident until sometime the next day (R 343-344).

The Idaho Power Company has also done work for the Pacific Fruit Express, as has the Strand Electric Company. The Pacific Fruit Express is not required to call the Union Pacific electricians (R 358-359), and the Pacific Fruit Express does lots of their own work (R 358). As a matter of fact, the meter inside the sub-station was originally hooked up by the Idaho Power Company (R 284). The meter reader has to have someone at the Pacific Fruit Express let him in to read the meter, either Shoup or Johnson (R 114-115), and he has no key to the sub-station (R 115); Shoup has them (R 169, 293).

## SPECIFICATION OF ERRORS

### I.

The court erred in refusing to direct a verdict in favor of the Union Pacific Railroad Company, for the reasons stated in its Motion for Directed Verdict (R 363-365).

### II.

The court erred in refusing to grant the Motion of the Union Pacific Railroad Company for Judgment Notwithstanding the Verdict, for reasons set forth therein (R 20-28), and for reasons set forth in its Motion for Directed Verdict, (R 363-365).

## III.

The court erred in permitting appellees witness Elmer V. Smith to testify, over appellant's objection, to the duty of one furnishing electricity. The question, objection and ruling are as follows:

"Mr. Smith, basing your answer now upon the condition that you have been describing there, from the exhibit and based upon your knowledge as an electrician and upon your knowledge of the National Safety Code, have you an opinion as to what the duty of one furnishing electricity under those circumstances, -yes, I will leave it that way, as to what would be the duty of one furnishing electricity under those conditions, - have you an opinion?

"The Court: You may answer that question yes or no.

"A. Yes.

"Q. And what is your opinion as an expert?

"Mr. Casterlin: If the Court please, we object to this question on the ground that it is invading the province of the jury and the province of the Court. The allegation in the complaint is that the defendant violated the rights of the plaintiff and this witness is asked in substance and effect, if the defendant has violated that duty. He is not being asked the question which I think counsel intended to ask him. He has asked the question whether or not he has, that is, the defendant has violated that duty, which necessarily involves the inference that it owes a duty in that respect and has violated it and that invades the province of the Court and the jury and attempts to pass

or passes upon the merits of the allegations of the complaint.

"The Court: I take it the only way the jury or the Court or anyone else could get any information on this matter is from the opinion of experts. There would have to be some foundation for the jury to pass upon the question that would be submitted to them. The only way I know of that they could get that information would be from physical conditions and from opinions of experts. This man is qualified as an expert. There is only one part of the question that possibly should be eliminated and that is the safety code, because the safety code is not in evidence. I will let him answer.

"A. My opinion in this is,—I don't know whether to use the word 'duty' or 'practice.' But in my observation over previous years, the power companies and other distributors of electricity will not, knowingly, and if it is within their knowledge, deliver electricity to hazardous installations; the principal purpose of that is to protect their equipment ahead of it. In other words, in this case, the Batiste Springs Power Line and Water Supply depended upon the same circuit so it strikes me that they would hesitate, or should hesitate to supply current to a hazardous installation."  
(R 192-194).

#### IV.

The court erred in giving the italicized portion of the following instruction:

"The general rule of law is that where one furnishing and supplying electricity for a valuable consideration, merely transmits its electrical current from its line to the consumer's wires, which it did not in-

stall, and does not control, it has no duty to inspect such wires and is not liable for injuries caused by defects in them. *However, where the company knows of any defects or by the exercise of ordinary care required of a company dealing in electricity, would know of such defects, its duty is to stop and not to send its deadly current to the defective appliances or equipment of the consumer or to and through defective electrical apparatus and it is liable for injuries to person or property caused by a breach of this duty.*" (R. 374).

Objection urged at the trial, that the portion of said instruction objected to did not apply to the facts in this case because there were no defects in the substation (R 383).

## V.

The court erred in giving the italicized portion of the following instruction:

"With respect to knowledge on the part of an agent which may be imputed to his principal, the law is that relevant knowledge may be acquired by an agent, either before the time of his employment or after he becomes agent. The important matter is not how the agent acquired the knowledge, but whether or not he had the knowledge when it became relevant in his work for the principal. If the agent has the information in mind at the time it becomes relevant in his work, the principal is bound equally where the knowledge was acquired privately by the agent as where he obtained it while acting as such agent. *Therefore, where the agents of a company supplying an electric current had or should have had knowledge of a hazardous and dangerous condition of wiring and ap-*

*pliances maintained by a customer, and continue to furnish such current with such knowledge, if injury occurs by reason of such hazardous conditions the company is liable for injuries occurring as the proximate result of furnishing such current."*

(R 375).

Objections urged at the trial, that there was nothing more hazardous or dangerous about this substation than would exist at any substation if it had been properly operated. That there is a difference between dangerous and defective condition (R 383).

## VI.

The court erred in giving the following instruction:

"If from a preponderance of the evidence, you believe that at the time of the alleged injury to LaVerl Johnson, the defendant, Union Pacific Railroad Company, was furnishing electricity to the Pacific Fruit Express Company for a valuable consideration and that the said Union Pacific Railroad Company was advised of or by the exercise of ordinary care the Union Pacific could have and should have known of the conditions that existed at the sub-station on the date of the accident, and you further find that such conditions were dangerous and hazardous to life and property and that the Union Pacific Railroad Company continued to furnish high voltage electricity through said lines and into said sub-station and that as a proximate cause thereof LaVerl Johnson was injured, then the defendant was negligent."

(R 377).

Objections urged at the trial, that there was nothing more

hazardous or dangerous about this substation than would exist at any substation if it had been properly operated. That there is a difference between dangerous and defective condition. (R 383).

## VII.

The court erred in refusing to give appellant's Requested Instruction No. 1, reading as follows:

"You are instructed that under the evidence in this case that the plaintiffs are not entitled to recover against the defendant and you are accordingly directed to return a verdict in favor of the defendant Union Pacific Railroad Company and against the plaintiffs, LaVerl and Joleen Johnson."  
(R 37-38).

Objections urged at the trial, that it should have been given for the reason set forth in appellant's Motion for Directed Verdict (R 363-365, 383).

## VIII.

The court erred in refusing to give appellant's Requested Instruction No. 6, reading as follows:

"If you find from the evidence in this case that after the substation was constructed that it was turned over to and accepted by the Pacific Fruit Express Company who thereafter owned, operated or controlled it, then you are instructed that the defendant Railroad Company in this case, by merely furnishing



electricity to such substation, can not be held responsible for the injuries to LaVerl Johnson.”  
(R 38).

Objections urged at the trial, that the instruction correctly stated the law and was not otherwise given (R. 384-385).

### IX.

The court erred in refusing to give appellant's Requested Instruction No. 7, reading as follows:

“If you find that plaintiff LaVerl Johnson sustained his injuries solely and proximately by reason of someone at the Pacific Fruit Express Company not pulling the switch to cut off the power to the lightning arrestors or that no one at the Pacific Fruit Express Company warned LaVerl Johnson that the power had not been cut off to the lightning arrestors then the plaintiffs are not entitled to recover and your verdict should be for the defendant. In other words, the defendant Union Pacific Railroad Company cannot be held liable for any acts or conduct on the part of the Pacific Fruit Express Company, its agents, servants or employees.”  
(R 38).

Objection urged at the trial, that said instruction was in accordance with the facts and the law, and was based upon the decision in 10 Fed. (2d) 66. (R 385).

### X.

The court erred in refusing to give appellant's Requested Instruction No. 8, reading as follows:

"If you find that the injuries to the plaintiff LaVerl Johnson were caused by the method of operation or the failure to properly operate said substation by the Pacific Fruit Express Company and because of that the plaintiff LaVerl Johnson was injured, then you are instructed that the action or non-action of the Pacific Fruit Express Company was the active, independent, intervening cause and hence the proximate cause of the resulting injury to the plaintiff LaVerl Johnson and your verdict must be in favor of the defendant."

(R 38-39).

Objections urged at the trial, this instruction was in accordance with the law and the decision in 10 Fed. (2d) 66 (R 385).

## XI.

The court erred in refusing to submit to the jury appellant's Special Interrogatory No. 1, reading as follows:

"If you return a verdict in favor of the plaintiffs state how and in what manner you find that the defendant Union Pacific Railroad Company was negligent." (R 39).

## XII.

The court erred in refusing to grant appellant's Motion for a New Trial (R 20-28), for the reasons set forth therein, and for the following additional reasons:

(a) That the evidence is wholly insufficient to justify the verdict for the reason set forth in paragraph II of appel-

lant's Motion for New Trial (R 21).

(b). That the verdict is grossly and monstrously excessive (R 22).

(c) That the verdict is grossly and monstrously excessive and appears to have been given under the influence of passion, prejudice, caprice, or sympathy, and shocks the sense of justice and shows an utter disregard for the instructions of the court (R 22).

### XIII.

That the verdict is against the law for the reasons set forth herein (R 22).

### XIV.

That the evidence is wholly insufficient to support the judgment entered on the verdict for the reasons set forth herein, and for the reasons set forth in paragraph II of appellant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial (R 20-28), and for other reasons therein set forth.

## ARGUMENT

Basically the issues in this case may be stated as follows:

1. Was the appellant in fact delivering electrical energy to the Pacific Fruit Express sub-station at Pocatello at the time Johnson was injured?
2. If so, was it negligence to do that, and

3. Was such act the proximate cause of Johnson's injuries?

These three questions are answered in the negative by the facts and the law to be presently discussed.

First of all, however, and decisive in and of itself, is the fact that,

*The Pacific Fruit Express Company by virtue of its lease, Exhibits 27 and 29 (R 322-333, 336-339), had exclusive possession and control of the premises on which the substation was located, and any liability resulting from the operation of the substation would be that of the lessee Pacific Fruit Express Company.*

*City of Lewiston vs. Isaman,*  
19 Ida. 653, 115 Pac. 494;

*Olin vs. Honstead,*  
60 Ida. 211, 91 Pac. (2d) 380, 383, 384;

*Goodman vs. Harris,*  
(Cal.) 253 Pac. (2d) 447.

In the Olin case the Supreme Court of the State of Idaho stated that it did not appear from the complaint that when the room was leased it was not a safe and proper place in which to conduct a drug store; that the danger arose from adding the stock of fireworks, and that was a detail in the conduct of the tenant's business over which the landlord had no control. The Supreme Court further stated:

“After the period of tenancy commenced the landlord had no power, and owed no duty, to supervise his tenant’s business to the end that it not be conducted in such a way as to be dangerous.”

A lessor is not liable to a business invitee of his lessee even though aware of a dangerous condition existing on the premises, and could have prevented the continuance of the dangerous condition by cancelling the lease. *Goodman vs. Harris*, supra.

*The railroad was not delivering electrical energy to the Express Company, and in no event was it bound to foresee or guard against the extra-ordinary conduct of the officers or agents of the Pacific Fruit Express Company and accordingly the appellant was not negligent. (Specification of Errors I to XIV Inc.).*

Prefacing a discussion of this subject it should be kept in mind that the sub-station in question, and the transmission line leading to it, were owned, operated and controlled by the Pacific Fruit Express Company and not the Union Pacific Railroad Company (Exhibits 30, 31, 32), (R 262-265, 250-253, 266, 273-274, 294-296, 332-333); that when it was completed in 1925, or thereabouts, it was accepted by Mr. Branum for the Pacific Fruit Express Company (R 277); that the Pacific Fruit Express was merely a co-user of electrical energy delivered to the Pacific Fruit Express and the Railroad jointly by the Idaho Power Company, but only one billing is made for the energy and that is to the Union Pacific, who bills the Pacific Fruit Express for what it uses. See Exhibit 21.

The sub-station was standard when built, and is as capable and safe now of receiving energy as it was at the time it was built (R 236-238, 345-346); there is nothing defective about it or any of the equipment in it (236-238, 345); there has never been an injury from the time it was built in 1925 until LaVerl Johnson received an injury in 1950 (R 283); the Pacific Fruit Express had the only keys to the substation, which was always kept locked, and the Railroad had no keys (R 197, 293); there were switches in the substation, not only to deenergize the transformers, but also the lightning arrestors (R 162, 175, 182-183, 239, 286, 304, 345); and if the sub-station on the day in question had been operated properly by the Pacific Fruit Express Company the injuries to LaVerl Johnson would not have occurred (R 183, 203-204, 209, 237-239, 246, 345).

There is absolutely no evidence in the record that the Railroad Company knew, or had reason to believe, that LaVerl Johnson was to go into the sub-station on Saturday afternoon, November 4, 1950, or at any other time. It could not reasonably anticipate that he or anyone else would be given the keys to enter this sub-station unaccompanied (that had never occurred before). It had no reason to believe that if he or anyone else was sent in that he or they would not be warned that the switches leading to the lightning arrestors had not been pulled or that these lightning arrestor switches would not be pulled if Johnson had any work in and about the arrestors. Neither could the Railroad anticipate that Johnson having been informed to paint wires to and from the transformers in the larger transformer cage the same as he did in the smaller

transformer cage, that he would ignore such instructions and proceed to a point 12 to 15 feet behind the transformers and take hold of a bare wire leading to the arrestors.

The Railroad was not bound to foresee and guard against such extra-ordinary conduct on the part of the Pacific Fruit Express Company, or LaVerl Johnson, and its failure to do so is not negligence.

Every person has the right to presume that every other person will perform his duty and in the absence of reasonable grounds to think otherwise it is not negligence to assume that one is not exposed to dangers which come to him only from violation of law or duty by such other person.

*Leo vs. Dunham (Cal.)*,  
264 Pac. (2d) 1, 3.

In *Richards vs. Stanley (Cal.)*, 271 Pac. (2d) 23, 27 the court held that in the absence of legislation imposing a duty that the owner of an automobile leaving his keys in it owed no duty to the general public to protect members thereof from risk of motoring activities of a thief, the court said:

“Thus a duty to prevent such harm would involve more than just the duty to control the car, it would involve a duty to prevent action of a third person.”

A defendant “is not responsible for a consequence which is merely possible according to occasional experience, but only for those consequences which are probable according to ordinary and usual experience.”

*Garrison vs. St. Louis & S. F. Ry. Co. (Kan.)*,  
271 Pac. (2d) 307, 311.

In *Probart vs. Idaho Power Company*, 74 Ida. 119, 258 Pac. (2d) 361, the court in holding that the Power Company was not negligent stated that a Power Company could not be held negligent for failing to anticipate that persons operating cranes and derricks on the highways or streets, may raise them to an unsafe height and contact overhead wires:

“Under such conditions the law only requires the company to reasonably guard against probabilities, not possibilities.”

In *Atchison T & S. F. Ry. Co., vs. Calhoun*, 213 U. S. 1, 53 L. Ed. 671, the principle involved was the same as in the case at Bar. In that case the railroad had in the dark left a baggage truck standing on the very end of the platform at a place where it could hardly be anticipated that passengers would alight, and a person running along the side of a moving train attempting to hand Mrs. Calhoun's baby to her stumbled over the baggage truck, injuring the baby. Plaintiff had judgment, which the United States Supreme Court reversed. Quoting from *Pollock on Torts*, the court in part said:

“The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely on the known course of things.”

In *Cole vs. German Sav. & L. Soc.*, 124 Fed. 113, 63



L. R. A. 416, the defendant was sued as a result of its alleged negligence in the operation of an elevator. As plaintiff passed through a hall, a boy who had been riding and visiting with the elevator operator hurriedly passed the plaintiff, seized the sliding door to the elevator shaft, pushed it back as far as it would go and stepped back. The plaintiff, supposing the boy was the operator of the elevator stepped into the shaft and fell about ten feet and was injured. A recovery to the plaintiff was by the court denied. The decision in our opinion sets forth the principals of law which are applicable to the facts in the case at Bar. It defines intervening cause and held that the injury to the plaintiff was the natural and probable consequences of the act of the boy who proceeded the plaintiff to the elevator and that his act was the moving and efficient cause, without which the accident would not have occurred. The court said:

“There is no evidence in this case that any such accident or injury as that from which the plaintiff suffers ever followed the defendant’s acts of negligence before the plaintiff fell into the well. Not only this, but there is no evidence that the accident and injury to the plaintiff resulted from these acts or omissions, but positive and convincing testimony that they were produced by the wrongful act of another.”

In the case at Bar the facts are undisputed that this substation had operated satisfactorily for a period of twenty-five years, and the injuries to LaVerl Johnson would not have occurred except for the acts and conduct of the officers or agents of the Pacific Fruit Express.

The Cole case has been cited a great many times, and has been cited with approval by the Idaho Supreme Court in the case of *Antler vs. Cox* 27 Ida. 517, 149 Pac. 731. In that case the plaintiff alleged an unsafe and unsuitable condition of a chain, which curled and twisted about in a manner that the trail hook struck the plaintiff when a horse ran away. There was testimony that the appliance of the chain furnished to the plaintiff was not the same as those generally used, or which was ordinarily or customarily used for such work. The court in citing the Cole case said:

“The rule is thoroughly established by the authorities that proximate causes are such as are the ordinary and natural results of the omission or negligence complained of, *and are usual and might have been reasonably expected to occur.*” (emphasis ours).

What occurred in the case at Bar was neither usual nor could it have been expected to occur. The court in the Cox case further said:

“There is no evidence to show that it was dangerous when used in the manner contemplated, and when the horse was not running away.”

So, in the case at Bar, there was no danger from the act of letting electrical energy go into the substation. It became dangerous only because of the acts or omissions of the Pacific Fruit Express Company, as we have related.

In *Hair vs. City of Lynchburg* (Va.) 181 S. E. 285, 287, the plaintiff was injured in a swimming pool that had been built in 1921 and used every year after that until plaintiff's

accident in 1931, during which time no accident had occurred. The court in denying a recovery to the plaintiff stated that the construction and operation of the pool was reasonably safe for those who exercised a like degree of care in making use of it. The court quoted from 22 RCL 124, the pertinent part of which is as follows:

“The natural and probable consequences are those which human foresight can foresee, because they happen so frequently that they may be expected to happen again. The possible consequences are those which happen so infrequently that they are not expected to happen again.”

*Negligence of the Railroad cannot be predicated on the theory it was delivering electrical energy to the Pacific Fruit Express Company, or upon any other theory. (Specification of Errors I to XIV, Inc.).*

Appellant was not a producer of the energy and neither did it deliver it. The Pacific Fruit Express Company was permitted for its own benefit to tap a line onto the Railroad Batiste Line and obtain power under a combined load from the Idaho Power Company at a cheaper rate than previously, because it could share in the total taken by both the Pacific Fruit Express Company and the Oregon Short Line Railroad Company (Ex. 26, R 314-319).

The transmission line to the substation, and the substation, served no railroad facilities or purpose. When the power reached this transmission line it was the exclusive product of the Pacific Fruit Express Company and under its control. Appellant had nothing to do with it or about it. The

Pacific Fruit Express Company had the means and ability to control it and shut off all power in the sub-station by using available switches at the sub-station, which was owned, operated and controlled by the Pacific Fruit Express Company. That the Railroad and the Pacific Fruit Express Company were merely co-users of power from the Idaho Power is also established by respondent's Exhibit No. 21. The only duty appellant owed was to the Pacific Fruit Express Company to permit the latter to obtain its power under a combined load from the Idaho Power Company by tapping a line onto the railroad line, which, of course, involved no duty on the part of the appellant to respondent LaVerl Johnson, or anyone else working at or about the substation, or elsewhere on Pacific Fruit Express Company premises.

*Palsgraf vs. Long Island R. Co.*,  
248 N. Y. 330, 162 N. E. 99, 59 A.L.R. 1253.

The respondents never proved, and could not prove, that the appellant owed any duty to LaVerl Johnson. Accordingly appellant was not negligent or liable.

*Chatterton vs. Pocatello Post*,  
70 Ida. 480, 223 Pac. (2d) 389, 20 A. L. R.  
(2d) 783;

*Northern R. Co. vs. Page*,  
274 U. S. 65.

Nevertheless, even assuming for the sake of argument that it was furnishing the energy, it still was not negligent. The sub-station and the transmission line to it were owned,

operated, controlled and maintained by the Pacific Fruit Express Company, and under such circumstances the Railroad is not responsible for injuries to persons on such premises.

The rule is well stated in *20 C. J.*, page 364, Section 49, as follows:

*“Companies and persons Liable.—1. Ownership and Control of Appliances.* Where wiring or other electrical appliances on private premises are owned and controlled by the owner or occupant of such premises, a company which merely furnishes electricity is not responsible for the insulation or condition of such wiring or appliances and is not liable for injuries caused by their defective condition, to such owner or occupant, or to third persons on such premises. A like rule has been applied to the poles and wires of a distributing company to which a generating company sells and delivers electricity for distribution and sale to the patrons of the distributing company. The fact that the injury occurred on a street or highway does not alter the rule. The duty and responsibility of a mere generating company is limited to making a proper connection and delivering the electric current to the purchaser's wires and appliances in a manner which, so far as such delivery is concerned, protects life and property, and there is no duty of inspection to see that the purchaser's wires and appliances are in a safe condition and kept so. \* \* \* ”

See also *29 C.J.S.* 611, Sec. 57 A;

*18 Am. Jur.* 498, Sec. 102.

This Rule is also set forth and annotated in *134 A. L. R.* with propositions of law stated at pages 508, 511, 515, 517 and 518. As mentioned on page 526 of the Annotation, there

are some cases where there may be liability when electricity is supplied by a company having knowledge of "defective condition of wiring and appliances maintained by the consumer," but we have found no cases which have held a defendant, such as the Railroad Company in this case, liable where it merely permits another to take power from its line.

See—*Kelly vs. Duke Power Company* (4 Cir.)  
97 Fed. (2d) 529.

In the case at Bar, there were no defects. Other cases supporting the proposition are,—

*Benard vs. Vorlander*, (Cal. DCA)  
197 Pac. (2d) 42, 45;

*City of Cushing vs. Presbury* (Okla. 1941),  
109 Pac. (2d) 1077;

*Hill vs. Pacific Gas & Elec. Co.*,  
(Cal.) 136 Pac. 492;

*Mullican vs. Meridian Light & R. Co.*,  
(Miss.) 83 So. 816, 9 A.L.R. 165;

*Perry vs. Ohio Valley Elec. R. Co.*,  
(W. Va.) 74 S.E. 993;

*Roberts vs. Pac. Gas & El. Co.*,  
(Cal. DCA) 283 Pac. 353;

*Irelan-Yuba Gold Quartz M. Co., vs. Pacific Gas  
& Elec. Co.*,  
(DCA Cal.) 105 Pac. (2d) 616;

*Hoffman vs. Leavenworth Light, H & P. Co.*,  
(Kan.) 138 Pac. 632, 50 L.R.A. (NS) 574;

*Minneapolis General Electric Co. vs. Cronon*,  
166 Fed. 651, 20 LRA (NS) 816;

*Pressley vs. Bloomington-Normal Ry. & Light Co.*,  
(Ill.) 111 N.E. 511.

*Memphis Consol. Gas & Elec. Co., vs. Speers*,  
(Tenn.) 81 S.W. 595;

*Burns vs. Carolina Power & Light Co.*,  
(4 Cir.) 193 Fed. (2d) 525.

In *Benard vs. Vorlander*, *supra*, the court held that a company merely selling electrical power transmitted through its facilities owned and maintained by others upon their own property, in the absence of a request to do so, was not required to shut off its power because the owner of such property had commenced the construction of a building so close to the lines as to endanger workmen engaged in such work.

In *Hoffman vs. Leavenworth Light, H & P. Co.*, *supra*, where judgment for the plaintiff was reversed, the court stated that where power is merely furnished to a responsible party who owned and controlled the poles, wires and appliances which were "in proper condition to receive the current safely," that the furnishing party was not required at its peril to see that such equipment was kept safe, but only be liable if charged with knowledge "of defects." In the case at bar there were no defects.

In *Minneapolis General Electric Co., vs. Cronon*, *supra*, we think that decision upon the facts in that case and the principle involved, could be paraphrased to fit the case at bar as follows:

“The substation was constructed by the OSLRR Co., (not a party to the action) in 1925; owned and operated by the Pacific Fruit Express; its construction was neither improper or imperfect, it was standard when constructed, it was not defective, it was capable of operating as a substation on the day of the accident, the same as when constructed, and it became dangerous to Johnson only because of the acts or omissions of the Pacific Fruit Express Company, by one of its agents giving him a key to go in unattended to paint leads to and from the transformers (not the lightning arrestors), and advising him the power was off, when as a matter of fact only the transformers had been de-energized, and the lightning arrestors still alive, without pulling the disconnect switches to the lightning arrestors. So there is no reasonable escape from the conclusion that the immediate cause of Johnson’s injuries was the energized condition of the lightning arrestors, the direct fault of which was the Pacific Fruit Express over whose action the Union Pacific had no right of control.”

In *Memphis Consol. Gas & Elec. Co. vs. Speers*, supra, where judgment for the plaintiff was reversed, the court said:

“We understand that liability for an injury occasioned through such a defect depends upon the interest in or control over the appliances in which the defect exists, and, if there is neither interest nor control, there would be none.”

In *Burns vs. Carolina Power & Light Co.*, supra, the defendant was held not liable, and, as the court remarked:

“This terrible and tragic accident came about as a result of negligence on the part of the brick yard employees.”



After the construction of the substation by the Oregon Short Line Railroad Company, and its acceptance by Mr. Branum on behalf of the Pacific Fruit Express Company, it was the responsibility of the Pacific Fruit Express to maintain and operate it, and as a result of its operation it alone would be responsible for injuries occurring.

*Goar vs. Village of Stephen,*  
(Minn.) 196 N.W. 171;

*Bogoratt vs. Pratt & Whitney Aircraft Co.,*  
(Conn.) 157 A. 860.

*Howard vs. Reinhart & Donovan Co.,*  
(Okla.) 166 P. (2d) 101.

In the Bogoratt case the court said:

“When he accepts work that is in a dangerous condition, the immediate duty devolves upon him to make it safe; and if he fails to perform this duty, and a third person is injured, it is his negligence that is the proximate cause of the injury.”

The court, of course, correctly instructed the jury that the appellant could not be held responsible for any of the acts of the Pacific Fruit Express Company.

*Perry vs. Ohio Valley Elec. R. Co.,*  
(W. Va.) 74 S.E. 993;

14 C. J. 58, Sec. 19;

14 C. J. 873, Sec. 1332.

As we shall presently show, if we have not already done so, it was the conduct of the Pacific Fruit Express Company that was the active, independent, and intervening cause and hence the proximate cause of LaVerl Johnson's injuries.

*The proximate cause of Johnson's injuries was the acts or omissions of the Pacific Fruit Express Company. (Specification of Errors I, II, VII, IX, X, XII, XIII, XIV).*

LaVerl Johnson was not an employee of the appellant. It had no control over him, or for that matter over the substation or the transmission line. He was employed by the Pacific Fruit Express Company, a co-user of electrical energy obtained from the Idaho Power Company.

Assuming, but not admitting, negligence, the facts of the case and the applicable law compel a conclusion, as a matter of law, that the proximate cause of LaVerl Johnson's injuries was the unusual careless conduct of the Pacific Fruit Express Company's officers and employees.

The court instructed the jury as follows:

"The proximate cause of injury is that which in a natural and continuous sequence, unbroken by any new independent cause, produces the injury, and without which the injury would not have occurred."  
(R 372).

This is probably the usual definition of proximate cause and while general in its nature it establishes under the facts in this case that appellees failed to prove the appellant negligent, or if, by a stretch of the imagination, it might be thought

the appellant was negligent, the appellees failed to prove or establish that any such negligence was the proximate cause of the injuries.

The fact that electrical energy was going into this substation would not have caused injury to Johnson had it not been for the acts and conduct of the Pacific Fruit Express Company's officers or agents.

The natural and continuous sequence, of electrical energy going into the substation was definitely broken by a new and independent cause—acts or omissions of the Pacific Fruit Express Company previously mentioned and which the Railroad could not reasonably foresee. Other Pacific Fruit Express men were in the substation the morning of the accident but they were warned that the power was still alive in the arrestors (R 310, 313). Three Pacific Fruit Express men were in the substation, and one was a Pacific Fruit Express electrician (Judge). The switch to deenergize the transformers was pulled but not the switches to the arrestors. If any one knew what the Pacific Fruit Express Company was going to do in the substation that day it was these three men, yet neither of them foresaw any danger in leaving the switches to the arrestors connected. Later H. O. Johnson told LaVerl he wanted him to paint the cables or wires to and from the transformers; nothing was said about the arrestors, and according to LaVerl, H. O. Johnson told him the power was off in the substation. That was incorrect.

Neither H. O. Johnson, nor anyone else from the Pacific Fruit Express, told anyone on the Railroad what was to be

done or that LaVerl was going into the substation to paint cables or wires to or from the transformers and that he might misconstrue his instructions and paint a bare wire leading to the live arrestors. In the absence of advice to the contrary the Railroad had every right to assume that the station would be properly operated as it had been since construction was completed, or for a period of twenty-five years.

An injury that is not the natural consequence of the negligence complained of and that would not have resulted from it but for the interposition of some new, independent cause that could not have been anticipated is not actionable negligence and accordingly all of the acts or failures to act on the part of the Pacific Fruit Express Company's officers or agents (and they had control of the injured Johnson and also owned, operated and controlled the substation), were the active, independent, intervening and superseding causes, without which the injuries to LaVerl Johnson would not have occurred.

*United States vs. Rothschild International Steve.  
Co.*

(9th Cir.) 183 Fed. (2d) 181;

*Splinter vs. City of Nampa,*

74 Ida. 1, 256 Pac. (2d) 215;

*Chatterton vs. Pocatello Post,*

70 Ida. 480, 223 Pac. (2d) 389;

*Antler vs. Cox,*

27 Idaho 517, 149 Pac. 731;

*Clark vs. Chrisop,*

72 Ida. 340, 241 Pac. (2d) 171;

*Atchison, T. & S. F. Ry. Co., vs. Calhoun,*  
213 U.S. 1, 53 L. Ed. 671;

*Cole vs. German Sav. & L. Society,*  
124 Fed. 113, 63 L.R.A. 416;

*Hair vs. City of Lynchburg,*  
(Va.) 181 S.E. 285, 287.

We have heretofore discussed the cases of *Cole vs. German Sav. & L. Society* and also *Antler vs. Cox*, under the heading of negligence. These two cases, in our opinion, tell us that there was no negligence on the part of the appellant in the case at Bar, but also that the acts or omissions of the Pacific Fruit Express Company were the proximate cause.

The authorities just referred to deal directly with intervening cause, and it is interesting to note that this court and the Idaho Supreme Court have announced the principle of intervening cause so clearly and effectively as to leave no doubt but that the acts or failure to act on the part of the Pacific Fruit Express Company's officers or agents constitute the proximate cause of the injuries to LaVerl Johnson.

In *United States vs. Rothschild International Steve. Company*, supra, this court stated that the question there presented was whether the United States or Rothschild were proximately responsible for injuries to one Dillon. Rothschild permitted Dillon to work where it knew there was a defect, relying upon a chance nothing would happen, which except for a defect was almost the identical situation as between Pacific Fruit Express and LaVerl Johnson. In the Rothschild case this court held that the proximate cause was the negli-

gence of Rothschild, and in support of the decision quoted from Restatement of Torts, Section 441, as follows:

“The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor is liable for another’s harm are usually, but not exclusively, cases in which the actor’s negligence has created a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actor’s negligence is often called passive negligence, while the third person’s negligence, which sets the intervening force in active operation, is called active negligence.”

In the following paragraph (c) of Section 441 of Restatement of Torts it is stated:

“An independent force is one the operation of which is not stimulated by a situation created by the actor’s conduct. An act of a human being or animal is an independent force if the situation created by the actor has not influenced the doing of the act.”

The text following the above quoted portion contains an applicable situation, and reads as follows:

“\* \* \* if A so loads his truck that any slight jolt may cause a part of its heavy contents to fall and, while B is trying to pass the truck, his car skids and side-swipes the truck so slightly that, were the truck properly packed, no harm would be done by it but because of the careless packing of the truck, it causes a heavy piece of machinery to fall on a pedestrian, the act of B is an independent intervening force.”

In the case at Bar A would be the Railroad, and B would be the Pacific Fruit Express Company.

We think the Idaho Supreme Court has also decided this question in favor of appellant in *Antler vs. Cox*, previously discussed, but very recently the Court had occasion to consider the question of intervening and superseding causes, in *Splinter vs. City of Nampa*, supra, where it held that the City of Nampa was not liable when it permitted a butane tank to be installed in an alley and an explosion occurred while it was being filled. The court laid down some patent rules of law, such as that an inference could not be based upon an inference, nor a presumption on a presumption; that where the proven facts are equally consistent with the absence, as with the existence, of negligence on the part of the defendant, the plaintiff had not carried the burden of proof and cannot recover, and in disposing of the case the court said:

“When a city grants a permit for an installation, or the doing of work, in its streets or alleys, if the installation or work is such that it becomes dangerous only by reason of negligence on the part of the permittee, in the manner in which the thing is done, or in subsequent operation of the installation, the permittee is liable, not the city, \* \* \* Assuming that the evidence would support an inference of negligence on the part of the city in the location of the tank, and bearing in mind that there is no evidence of any failure or breakage which caused any leaking to occur at the tank, prior to the explosion, the only remaining possible inference of negligence involving the city would be negligence on the part of the operator in filling the tank. In other words, while an insignificant amount of gas will ordinarily escape in the filling of

the tank, the loss of a dangerous amount (in the absence of the failure of equipment) could result only from negligence of the operator. *Under the circumstances such negligence would be the negligence of the permittee in the operation of the installation. It would be the active, independent, intervening cause, and hence the proximate cause, of any resulting injury*" (emphasis ours).

Equally important is the case of *Chatterton vs. Pocatello Post*, supra, where the plaintiff was denied a recovery on the theory that defendant's negligence, if any, was not the proximate cause of the injuries to Chatterton.

The court said:

"It may be stated as a general rule that negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by which the injuries are inflicted is not the proximate cause thereof. 38 Am. Jur. 702. \* \* \* and where an *intervening act of force is put in motion by another, and for which defendant is not responsible, there can be no recovery,*" (emphasis ours).

The Idaho Supreme Court in *Stearns vs. Graves*, 62 Ida. 312, 111 Pac. (2d) 882, 886, held that:

"There can be but one *proximate* cause, although that need not, in all cases, be the *sole* cause."

and just prior to this statement, said:

"\* \* \* It is generally understood in negligence cases that the final cause immediately antecedent to the infliction of the injury is the *proximate* cause of the injury."



In the case at Bar the final cause immediately antecedent to the infliction of the injury to Johnson were the various acts and omissions of the Pacific Fruit Express.

It is our opinion that the foregoing authorities are amply sufficient to compel, as a matter of law, a holding that appellant is not liable. There are, however, many other authorities in support of our position, the big majority of which are electrical energy cases.

*Polloni vs. Ryland*,  
(Cal. App.) 151 Pac. 296, 298;

*Stasulat vs. Pac. Gas & Elec. Co.*,  
(Cal.) 67 Pac. (2d) 678;

*Stackpole vs. Pac. Gas & Elec. Co.*,  
(Cal.) 186 Pac. 354;

*Hauser vs. Pacific Gas & Elec. Co.*,  
(Cal. App.) 23 Pac. (2d) 1068;

*Hayden vs. Paramount Productions*,  
(Cal. App.) 91 Pac. (2d) 231;

*Georgia Power Co., vs. Kinard*,  
(Ga.) 170 S.E. 688, 691;

*Harter vs. Colfax Electric Light & Power Co.*,  
(Iowa) 100 N.W. 508;

*Kentucky Utilities Company vs. Sutton's Admr.*,  
(Ky.) 36 S.W. (2d) 380;

*Leavitt vs. Stamp*,  
(Ore.) 293 Pac. 414;

*Seith vs. Commonwealth Electric Co.*,  
(Ill.) 89 N.E. 425;

*Johnson vs. Union Furniture Company,*  
(Cal. DCA) 87 Pac. (2d) 917;

*Goar vs. Village of Stephen,*  
(Minn.) 196 N.W. 171;

*Davis vs. Carolina Cotton & Woolen Mills Co.,*  
(4 Cir.) 5 Fed. (2nd) 575, 576;

*1 Shearman and Redfield on Negligence 101,*  
Sec. 37;

*Howard vs. Reinhart & Donovan Co.,*  
(Okla.) 166 Pac. (2d) 101;

*City of Okmulgee vs. Hemphill,*  
(Okla.) 83 Pac. (2d) 189;

*Girard vs. Monrovia City School Dist.,*  
(Cal. DCA) 264 Pac. (2d) 115;

*Gerber vs. McCall,*  
(Kan.) 264 Pac. (2d) 490, 493.

In *Stackpole vs. Pacific Gas & Electric Co.*, *supra*, the court said:

“It was not the delay in setting back the wires that killed the decedent, but the moving in of the piledriver before they were set back and were safely out of the way.”

In *Harter vs. Colfax Electric Light & Power Co.*, *supra*, where the wires in a hotel were unsuitable, and unsafe because of defective installation, the court said:

“Plaintiff’s theory seems to be that when the wire fell

upon him a short circuit was created, which did the damage complained of. This was due, not to defendant sending a dangerous current into the house, but to something over which it had no control, and for which it was not responsible."

In *Johnson vs. Union Furniture Co.*, supra, the court adopted the following rule of law:

"One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, \* \* \* is only remotely and slightly probable."

*The transmission of energy to the substation, irrespectively of how it got there or who was responsible for getting it there merely furnished a condition, which would not constitute the proximate cause.*

*Chatterton vs. Pocatello Post*,  
70 Ida. 480, 223 Pac. (2d) 389;

*Rowe vs. Northern Pacific Ry.*,  
52 Ida. 649, 17 Pac. (2d) 352;

*Hauser vs. Pacific Gas & Electric Co.*,  
(Cal. App.) 23 Pac. (2d) 1068;

*Leavitt vs. Stamp*,  
(Ore.) 293 Pac. 414;

*Seith vs. Commonwealth Electric Company*,  
(Ill.) 89 N.E., 425;

*Orton vs. Pa. R. Co.,*  
(6 Cir.) 7 Fed. (2d) 36;

*Hart vs. Wabash R. Co.,*  
(7 Cir.) 177 Fed. (2d) 492;

*The manner and method of the operation of the substation by the Pacific Fruit Express Company prior to and at the time LaVerl Johnson was sent into the substation by the officers and agents of the Pacific Fruit Express Company to work constituted the proximate cause.*

*Splinter vs. City of Nampa,*  
74 Ida. 1, 256 Pac. (2d) 215;

*Antler vs. Cox,*  
27 Ida. 517, 149 Pac. 731;

*Stackpole vs. Pacific Gas & Electric Co.,*  
(Cal.) 186 Pac. 354;

*Georgia Power Co., vs. Kinard,*  
(Ga.) 170 S.E. 688, 691;

*Leavitt vs. Stamp,*  
(Ore.) 293 Pac. 414;

*Woodruff vs. Bowen,*  
(Ind.) 34 N.E. 1113;

*Pittsburgh SS Company vs. Palo,*  
(6 Cir.) 64 Fed. (2d) 198, 200, 201.

The Railroad could not foresee that Johnson, when told to paint the same type of leads in and out of the transformer that he had been painting in the small substation in the morn-

ing would pass by the transformers, go around to the rear of the substation and start painting a bare wire leading to the lightning arrestors without making inquiry concerning whether such wires were dead or alive. It was a foolhardy thing for him to do and we think his act was also the proximate contributing cause.

*Stoffel vs. N.Y. N.H. & H.R. Co.,*  
(2 Cir.) 205 Fed. (2d) 411.

We think that if the jury considered the question of negligence at all that it must have found negligence merely from the fact that an accident occurred and that Johnson was severely injured, or that it found the appellant liable by looking backward, which, of course, cannot be done.

*Greene vs. Sibley, Lindsay & Curr Company,*  
(N.Y.) 177 N.E. 416 (Judge Cardozo);

*Sitarek vs. Montgomery,*  
(Wash.) 203 Pac. (2d) 1062.

The situation must be considered before and not after the event.

*Maue vs. Erie Railway Co.,*  
91 N.E. 629, 631;

*North Chicago St. R. Co., vs. O'Donnell,*  
115 Ill. A. 110, 112;

*Berlin vs. Wall,*  
95 S.E. 394, 397;

*Dwyer vs. Hill*,  
79 NYS 785, 786;

*Johnson vs. New York*,  
101 N.E. 691, 693.

Proof of a bare possibility that injury may have been due to a given cause does not justify a finding that it was so caused (or submission of the question to the jury), but evidence must furnish some logical basis for a finding that the result was due to such cause.

*Macaw vs. Oregon Short Line RR Co.*,  
49 Ida. 151, 286 Pac. 606.

The weight of the evidence must be more than a scintilla before the case may be properly left to the discretion of the trier of fact and bare possibility is not sufficient. Events too remote to require reasonable prevision need not be anticipated.

*Brady vs. Southern R. Co.*,  
320 U.S. 477;

*Hoffer vs. City of Lewiston*,  
59 Ida. 538, 85 Pac. (2d) 238.

The case for appellee is left without any substantial support in the evidence and the verdict can rest only upon mere speculation and conjecture, which cannot supply the place of proof.

*Pennsylvania R. Co., vs. Chamberlain*,  
288 U.S. 333, 77 L. Ed. 819;

*Moore vs. Chesapeake & O. Ry. Co.*,  
184 Fed. (2d) 176, 179; affirmed in 340 U.S.  
573, 95 L. Ed. 547, 550-551.

Accordingly appellant's Motion for Directed Verdict should have been granted or the trial court should have granted appellant's Motion for Judgment Notwithstanding the Verdict.

*The verdict is monstrous and grossly excessive from every viewpoint and the trial court should have granted appellant's Motion for New Trial (Specification of Errors XII, XIII, XIV).*

We respectfully submit that the jury arrived at the amount of the verdict in this case without due consideration to the facts and the law, and the size of it can only be accounted for as the result of passion, prejudice, pity or sympathy. We think it must shock the sense of justice and cannot be upheld under any theory.

The amount of \$225,000.00 put out at interest at as low a rate as  $2\frac{1}{2}\%$  will bring in \$5,625.00 per annum, or \$2,000.00 per year more than Mr. Johnson was earning at the time of the accident (\$3,600. R 53); at  $3\%$  the amount would be \$6,750.00, or nearly twice his yearly salary. This gives sufficient leeway for any anticipated increase in salary and would permit him to live off the interest alone and at his death would leave the principal unimpaired and an estate of \$225,000.00. Such a result is not in accord with the legal principles governing the award of compensatory damages for personal injury.

If we should apply the legal interest rate of 6% to this figure the annual amount would be \$13,500.00. That was done by the Idaho Supreme Court in the case of *Neil vs. Idaho & W. N. RR.*, 22 Idaho 74, 125 Pac. 331. The verdict in that case was set aside and in doing so the court stated:

“It is next contended that the verdict of \$35,000 is excessive, and shows that it was rendered through passion and prejudice and without due deliberation. The respondent testified that he was 40 years of age; that his salary as a conductor averaged about \$125.00 a month, which, if he worked continuously every month in the year, would amount to \$1,500.00 a year. The amount of the verdict, \$35,000, if put at interest at 7 per cent, would give a return of \$2,450.00 per year, which would probably be double the amount the respondent would earn, taking it one year with another, and at the death of respondent would leave \$35,000. The amount of the verdict is so excessive that it leads us to believe it was rendered through prejudice and passion and without deliberation.”

While this case was decided many years ago and the value of the dollar has undoubtedly decreased (offset by the spiral of wages) since that case was decided, nevertheless the principle still exists, that the verdict in this case is so excessive as to leave no question but that it was rendered through prejudice, passion, or sympathy, and without due deliberation, and that the court's instructions with reference to the measure of damages or the elimination of sympathy were not followed.

We arrive at the same result if we look at the verdict from another angle. Using the Present Value Annuity Table, 3



Idaho Code 387, and a discount rate of 3 %, for forty years life expectancy (R 213-214) the value of a dollar is found to be 23.1148, which, multiplied by \$3,600.00, Johnson's yearly salary, produces a figure of \$83,213.28, which would provide an annuity for him for forty years and takes care of his loss of wages, assuming he would work all of the time the next forty years, which is, of course, inconceivable. *Neil vs. Idaho W.N. RR.* supra, and *Denbeigh vs. O.W.R. & N.*, 23 Ida. 663, 132 Pac. 112, and would then, after deducting this amount from the verdict, leave the sum of \$141,787.00 to cover all other legal damages, which amount is so excessive for that feature of the case as to show passion, prejudice or sympathy without any question. This amount, however, could also be put out at interest at  $2\frac{1}{2}$  % and produce a yearly income of \$3,544.68, which is practically the amount of Johnson's yearly salary; or at 3 % the amount of \$4,253.61; again leaving the principal amount of \$141,787.00 intact.

The present value of aggregate future payments must be ascertained, and for this purpose annuity figures are utilized by following definite interest calculations upon which such present value is ascertained, and under circumstances such as exist in this case the adoption of a discount figure of 4 % is warranted. *Holliday vs. Pacific-Atlantic SS Company*, 117 Fed. Supp. 729, 735.

Therefore, using the same present value annuity table at a discount rate of 4 % (this is the figure the legislature said is to be used in figuring lump sum settlements under the Workmen's Compensation Law 72-321 I.C.); the value of the dollar for the fortieth year is 19.7928, which multiplied by

Johnson's yearly salary of \$3,600.00 produces a figure of \$71,254.00, which would again provide him with an annuity for forty years, and deducting that amount from the verdict of \$225,000.00 leaves the sum of \$153,746.00 for damages other than loss of earnings. Again, this amount put out at interest of  $2\frac{1}{2}\%$  would produce a yearly income of \$3,843.65; or at  $3\%$  would produce a yearly income of \$4,612.38, which is more than Johnson's annual salary at the time of the accident; and would still leave intact the principal amount of \$153,746.00 at the time of his death, and, of course, in addition to this he would also be drawing his annuity first provided for, free probably of any deductions.

"We think it unreasonable to suppose or presume that Mr. Kellerher would have maintained an earning ability to that extent for that period of time, or that he could have earned monthly wages which, when reduced to their present value, would be worth \$70,000.00. In our opinion, the amount of the verdict exceeds any rational appraisal or estimates of the damages sustained by the parties in whose behalf this action was brought."

*Kellerher vs. Porter,*  
(Wash.) 189 Pac. (2d) 223, 232.

The amounts discussed eliminate from consideration the following items which are normally present,—take home pay, sickness, lay-offs, labor disputes, seniority features, reduction in forces, lessened earnings, accidental death, or other factors which normally occur in a man's period of employment.

The amount of the verdict is such that it amounts to a penalty, or constitutes punitive damages; elements not present in this case. There is no way to account for the size of the verdict except that it was arrived at by passion, sympathy, or prejudice.

Before discussing this court's decision in the case of *Southern Pacific Co., vs. Guthrie* (9 Cir.) 186 Fed. (2d) 926, we would like to refer to this court's opinion in the case of *Cobb vs. Lepisto*, 6 Fed. (2d) 128, where the court held that the verdict was grossly excessive and required the granting of a new trial, and the case of *Virginian R. Co., vs. Armentrout* (4th Cir.) 166 Fed. (2d) 400, 4 A.L.R. (2d) 1064, where a verdict for \$160,000.00 for a thirteen months old child who had both hands and a portion of the arms cut off was set aside and a new trial granted.

This court in the Guthrie case discussed these two decisions and held that they were correctly decided, but in the Guthrie case did not order a new trial because the verdict was deemed to be only excessive and was not grossly excessive or monstrous, as we understand the opinion.

The Armentrout case, in our opinion presents a more severe situation than the case at Bar, for involved in that case was a thirteen months old child with both hands and a portion of the arms cut off. The court in that case determined that the verdict was excessive and used the present worth of a dollar in arriving at a solution. In that case the court remarked that the amount of the verdict based on a conservative estimate of a return of 3% would pay the child \$4,800.00 per year as

long as he lived, and enable him to leave the entire recovery of \$160,000.00 intact at his death. It was stated that the West Virginia Workmen's Compensation Law provided maximum compensation of \$18.00 per week, or \$936.00 per year. (In Idaho, and in the present case, Johnson receives \$22.00 per week, or a total of \$1,144.00 per year).

The court remarked that the child had been terribly injured and the jury must do its best to estimate the earnings; also that it should consider "that the child is bright and intelligent and with proper education may be able to develop high earning capacity in intellectual pursuits." And, of course, there is the same evidence in the case at Bar.

In the Guthrie case this court stated that a plaintiff should not be placed in a better position financially than he would have been if he had continued to work, and secondly, that the earning power of money should be calculated at not less than three percent (page 927). On this basis Guthrie obtained about \$40,000.00 damages other than for his loss of earnings, which this court agreed was too high, but not high enough to say "it was grossly excessive" or "monstrous."

In the case at Bar calculating earning power of money at 3% gives Johnson an annual salary of \$3,600.00 for the rest of his life for an amount of \$83,213.28, which deducted from \$225,000.00, leaves \$141,786.72 for all other damages. If this court thought that \$40,000.00 was too high in the Guthrie case, we think there can be no doubt but that in this case the verdict is monstrous where the figure instead of being \$40,000.00 is \$141,787.00. We think there can be no question but that the verdict was arrived at through pity,

sympathy, passion or prejudice and was not based upon compensation for his injuries, and a new trial must be had.

*Minneapolis, St. P. S. St. M. Ry. vs. Moquin,*  
283 U.S. 520.

The rules laid down in the Guthrie case demonstrate that the trial court erred in not granting a new trial because the verdict is against the clear weight of the evidence and results in miscarriage of justice, as the court says:

“The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.” Note 10, page 932, 186 Fed. (2d).

In Note 11, page 933, it is stated that the victim of an excessive verdict “is entitled to relief at the hands of the trial judge.”

Other cases in point are:

*Ford Motor Company vs. Mahone* (4th Cir.) 205 Fed. (2d) 267, where the verdict was for \$234,330.00, which was so excessive the court held the trial Judge should have set it aside instead of merely requiring a remittitur as a condition for allowing it to stand. There were other features in the case which helped to bring about perhaps sympathy or prejudice, nevertheless where a verdict cannot be accounted for except for sympathy, prejudice or pity the same rule obtains.

*Jones vs. Pennsylvania R. Co.*, 182 S.W. (2d) 157, a verdict for \$203,167.00 was set aside because the court

thought it was the result of passion or prejudice. Jones apparently was in a much worse condition than is Johnson.

*Loftin vs. Wilson* (Fla.) 67 So. (2d) 185, where a verdict for \$300,000.00 was set aside, and in which case the court also refers to the case of *Florida Power & Light Company vs. Watson*, 50 So. (2) 543, wherein the court set aside an award of \$260,000.00 and ordered a new trial.

In the case at Bar the verdict is 62 times the amount of Johnson's annual earnings and nearly twice as much as he could have earned over a period of forty years if he worked all of the time and his salary had remained constant. Such a situation shocked the conscience of the court in *Mo. K-T R. Co. of Texas vs. Ridgway* (8th Cir.) 191 Fed. (2d) 363, 368, and in which a verdict for \$98,800.00 was set aside and a new trial granted.

Johnson was, of course, seriously injured, and he has also made a remarkable recovery for a person injured as he was; that he is intelligent is evidenced by what he has accomplished since the accident.

He was first fitted with artificial limbs in July 1951 (R 53); entered and finished summer school at Idaho State College in 1951 (R 50, 51), and started driving an automobile the latter part of 1951, and, of course, has a driver's license (R 61).

Dr. Nelson testified that Johnson had had very little trouble with the stumps or artificial limbs after June 30, 1952, except for a little irritation a week before trial (R 152), and that he will have some chafing in the future, so that there

will be about one week a year that he cannot wear the legs (R 158).

Johnson can attach the artificial legs himself. He did it in the Doctor's office (R 154). As a matter of fact, Johnson progressed perhaps better than ordinary (R 159). In addition to going to school at Idaho State College and driving his own automobile (R 61), he is also selling ads for the Inter-mountain Alameda Enterprise (R 53). So, notwithstanding Johnson's serious injuries and handicaps as has been demonstrated, he is not going to remain idle. His studies no doubt will lead to the practice of law or will fit him for some other line of business, so that it cannot be said his earning capacity is entirely gone.

*The court erred in permitting appellees' witness Elmer V. Smith to testify, over appellant's objection, to the duty of one furnishing electricity. (Specification of Error III).*

The question, the objection, the ruling of the court, and the answer of the witness are fully set forth under Specification of Error No. III, and for the sake of brevity will not be further repeated here.

That this question and answer invaded the province of the court and the province of the jury is clear. It permitted the witness to state that there was some duty on the part of the appellant to discontinue service, permitting the witness to pass upon the merits of the complaint and in effect to make a conclusion on the whole case.

We think the law is all one way on the subject, as is stated in 2 *Jones on Evidence*, 4th Ed., pages 698, 699, as follows:

“\* \* \* whatever liberality may be allowed in calling for the opinion of experts or other witnesses, they must not usurp the province of the court and jury by drawing conclusions of law or fact upon which the decision of the case depends.

“Likewise, questions propounded to experts should not require answers involving questions of law, morals or duty, matters of conjecture or speculation;  
\* \* \*”

To the same effect are the following authorities:

*20 Am. Jur. 672, Sec. 799;*

*Stone vs. Pratt Consol. Coal Co.,*  
(Ala.) 80 So. 882;

*Baltimore Belt R. Co., vs. Sattler,*  
(Md.) 59 Atl. 654, 660;

*Wilkerson vs. City of ElMonte,*  
(Cal. DCA) 62 Pac. (2d) 790, 794;

*Gardine vs. Cottey,*  
(Mo.) 230 S.W. (2d) 731, 18 A.L.R. (2d)  
1100, 1118;

*Patterson vs. Howe,*  
(Ore.) 202 Pac. 225, 229.

This question also went to the issue of negligence. It is for the jurors to draw any conclusions the facts warranted, Smith could not do this for them.

*32 C.J.S. 82, Sec. 448;*

*32 C.J.S. 90, Sec. 453.*



The United States Supreme Court as well as this Court has decided this question to the effect that such a question and answer constitutes reversible error.

*United States vs. Spaulding*,  
293 U. S. 498, 79 L. Ed. 617;

*United States vs. Sullivan*,  
(9th Cir.) 74 Fed. (2d) 799;

*United States vs. Hibbard*,  
(9th Cir.) 83 Fed. (2d) 785.

The Supreme Court held in the Spaulding case that the question of permanent disability was not to be resolved by opinion evidence:

“It was the ultimate issue to be decided by the jury upon all the evidence in obedience of the Judge’s instructions as to the meaning of the crucial phrase and other questions of law. The experts ought not to have been asked or allowed to state their conclusions on the whole case.”

That, in effect, was what the witness Smith did, his testimony was not only inadmissible, but it was an erroneous conclusion as to the whole case.

This court in the Sullivan and Hibbard cases, *supra*, where physicians testified that a veteran was totally and permanently disabled, and objection was made that this was a direct invasion of the province of the jury, and the objection overruled, stated that the objection should have been sustained and judgments for the plaintiffs were reversed because of the error.

*The Court erred in giving to the jury certain instructions.*  
(Specification of Errors IV, V and VI).

The law with reference to the instructions set forth in Specification of Errors IV, V, and VI has already been covered in our discussion with reference to negligence and proximate cause, except for what will be presently mentioned.

With reference to the instruction contained in Specification of Error IV, our objection went to the last sentence, which is italicized. We earnestly urge that this part of the instruction was erroneous and prejudicial. It was not applicable to the facts in this case; there was absolutely no evidence by the appellees, or anyone else, that there was anything defective in any of the equipment or appliances in or about the substation. On the other hand, the proof is undisputed that there was nothing defective (R 182-183, 203-205, 236-237, 344-345).

The instruction emphasized the term "defect" in three different expressions—defects, defective appliances and defective electrical apparatus, upon which there was no evidence. This, in effect, injected an issue into the case which was not there.

An instruction not based upon evidence is erroneous and introduces before the jury issues not presented thereby and is well calculated to mislead and induce them to suppose that a state of facts constituting such issues existed.

*Nordquist vs. W. A. Simons Co.,*  
54 Ida. 21, 28 Pac. (2d) 207, 209;

*McIntire vs. O. S. L. RR. Co.,*  
56 Ida. 392, 55 Pac. (2d) 148, 150.

As was stated by the United States Supreme Court in *Norfolk & W. R. Co., vs. Holbrook*, 235 U. S. 625, 59 L. Ed., 392, where the facts brought out during the course of the trial were adequate to constitute a strong appeal to the sympathy, naturally engendered in the minds of the jurors, that

“In such circumstances it was especially important that the charge should be free from anything which they might construe as a permission to go outside of the evidence. It is the duty of the court in its relation to the jury to protect the parties from unjust verdicts arising from impulse, passion, or prejudice, or from any other violation of lawful rights.”

The instruction further in effect told the jury that the appellant was “dealing in electricity,” when the facts show it was not. As previously stated, the Pacific Fruit Express Company and the Union Pacific Railroad Company were merely co-users of power from the Idaho Power Company. The Railroad merely permitted the Express Company, at its request, to tap a line onto appellant’s line and to take its electricity in that fashion; but it was all generated and supplied by the Idaho Power Company. The Express Company owned, operated and controlled not only the substation but the line leading to it, and the Union Pacific Railroad Company had no responsibility concerning it, either to keep it in repair or to see that the Express Company obtained power. There was a meter in the substation in order to ascertain the amount of power used, because the Union Pacific was billed

for the whole amount and rebilled the Express Company for what it used, plus 10% for the transformer and transmission losses, but this did not put the Union Pacific in the electrical business; it was only a user or consumer, and nothing else. If the Idaho Power failed to supply power to the Railroad then the Pacific Fruit Express had no power and neither did the Railroad. It was not shown that the Railroad was generating any electricity and the instruction with reference to "deadly current" certainly prejudiced appellant's substantial rights.

The Union Pacific had no way of foreseeing all of the unusual and unlooked for things that were to take place that afternoon by the Pacific Fruit Express and the appellee LaVerl Johnson. It owed no duty to anyone to cut off this power, first, because it was not delivering electricity; secondly, because it was not the electrical energy going into the substation that legally caused the injuries; those injuries were legally and actually caused by the unusual conduct and method of operation by the Pacific Fruit Express; thirdly the Pacific Fruit Express owned, operated and controlled the line and it had the means and ability to cut off all power in the substation by pulling the pole-top switch and also the disconnect switches to the arrestors.

The substation was perfectly safe to receive the power and had been receiving for twenty-five years (R 236-237). Mr. Gilbert, who appeared as a witness for the appellees and the appellant, testified that there was nothing defective in or about the substation; that it was as safe now as at the time it was built; that it was capable of receiving safely the

energy being supplied, and under those circumstances he would not have advised his employer, the Idaho Power Company, to cut off the power (R 238).

With reference to the instruction contained in Specification of Error V, appellant claims that the italicized portion of the instruction was erroneous. This instruction, we contend was not applicable to the facts in this case. First of all, as we have stated, appellant was not supplying any electrical current to the substation; neither is there any evidence that the Pacific Fruit Express "was a customer of the defendant" with respect to electrical current, for the energy came from the Idaho Power Company. The Express Company and the Union Pacific were merely co-users of the power and the Railroad was neither generating or delivering it.

The italicized portion of the instruction refers to hazardous and dangerous conditions of the wiring and appliances maintained by a customer. There was nothing defective in the substation, and the Railroad was not delivering the power. If there were any hazardous and dangerous conditions in the substation which were responsible for Johnson's injuries, it was because the substation was not properly operated by the Express Company (R 183, 203, 209, 237, 239, 246).

*With reference to the instruction contained in Specification of Error VI.*

We have already discussed this instruction, we think, with reference to the previous instructions, and what we have said there applies to this instruction, particularly with reference to dangerous and hazardous conditions. However, it should be

noted that the appellant was not furnishing electricity to the Pacific Fruit Express, for a valuable consideration; or otherwise. The Idaho Power Company was the one that was furnishing the energy; the Express Company and the Railroad being joint users of that energy. There is no evidence that the Union Pacific in any event was obtaining any profit or valuable consideration out of the deal, for it merely billed the Pacific Fruit Express for what energy it used from the Idaho Power, plus a 10% transformer and transmission loss, which was agreed between the Oregon Short Line Railroad Company and the Express Company to be a loss. Therefore, the Railroad neither then nor now was making a profit out of the joint use of the power.

*The court erred in refusing to give to the jury certain of the appellant's requested instructions. (Specification of Errors VII, VIII, IX, X, XI).*

Specification of Error VII relates to appellant's Requested Instruction No. 1, which was a peremptory instruction and should, in our opinion, have been given by the court. The facts and the law with reference to this are fully discussed with reference to negligence and proximate cause.

Specification of Error No. VIII is appellant's Requested Instruction No. 6. This instruction should have been given because the law contained therein was not otherwise given.

The evidence shows without controversy that the appellant was not furnishing or supplying electricity but this instruction was requested, first because it stated the law, and secondly, because assuming but not admitting that the appel-

lant was delivering electricity, there was no liability on the facts if the jury found the facts to be as stated in the instruction. We think the jury should have been so instructed. *Schnee vs. So. Pac. Co.*, (9 Cir.) 186 Fed. (2d) 745, 748. The instruction is sustained by the authorities set forth in 134 A.L.R. 511.

*Specification of Error IX, which is appellant's Requested Instruction No. 7.* This instruction was vitally important and the law was not otherwise given to the jury. It is true that the court instructed the jury with reference to proximate cause, but only in a general way (R 372). No where was the jury instructed as to what facts or circumstances would constitute a break in any chain of causation, or what acts or conduct on the part of the Pacific Fruit Express officers or agents could be taken into consideration in determining proximate cause. The jury had the right to know this and that the law required an instruction telling them how or in what manner proximate cause could be determined. *Schnee vs. Southern Pac. Company*, *supra*. The instructions that were given were wholly insufficient to guide the jury in coming to a conclusion justified under the evidence.

The authorities set forth and discussed in connection with negligence and proximate cause fully support this instruction. The power going into the sub-station created at most only a condition and not the proximate cause. The manner and method of the operation of the sub-station by the Pacific Fruit Express constituted the proximate cause of Johnson's injuries.

*Specification of Error X refers to appellant's requested*

*instruction No. 8.* This instruction was a necessary one, for the law was not otherwise stated to the jury, except that proximate cause was in a most general way only mentioned. Without this instruction and appellant's Requested Instruction No. 7, the jury was given no guide to follow in applying proximate cause. The instruction, as we have demonstrated under our discussion of proximate cause, is an accurate statement of the law and was a necessary part of the case upon which the jury had no instructions. In addition to that, it was one of appellant's theories, and we think it was the duty of the trial court to instruct upon every reasonable theory finding support in the pleadings and the evidence.

*Idaho Gold D. Corp. vs. Boise Payette Lbr. Co.,*  
64 Ida. 474, 133 Pac. (2d) 1017, 1019;

*Mason vs. Hillsdale Highway Dist.,*  
65 Ida. 833, 154 Pac. (2d) 490, 498;

*Jones vs. Mikesh,*  
60 Ida. 680, 95 Pac. (2d) 575.

Specification of Error XI. This was a special interrogatory presented by the appellant requiring the jury to specify how and in what manner the Railroad Company was negligent if it returned a verdict in favor of the plaintiffs.

While we appreciate that the submitting of special interrogatories is generally discretionary, nevertheless in a case of this sort, where sympathy permeated the entire case to such a degree it is reasonable to suppose that because of this it was difficult for the jury to coolly and dispassionately consider



the merits of the case. LaVerl Johnson's injuries were very serious and generated pity and sympathy. We think under the evidence in this case that if the jury had been compelled to answer this interrogatory it could not have found any negligence on the part of the Railroad Company. In any event, there is no reason why a jury, when it returns a verdict certainly as high as it did in this case should not tell us upon what it based its verdict other than the fact that the man was seriously injured.

## CONCLUSION

We submit that appellant's Motion for Directed Verdict or Motion for Judgment Notwithstanding the Verdict should have been sustained, first, because appellant was not negligent; secondly, because negligence, if any, was not the proximate cause.

After the substation was built (R 277), it was accepted by Mr. Branum, and since that time it has been owned, operated and controlled by the Pacific Fruit Express Company. Exhibits 30, 31 and 32 (R 262-265, 250-253, 266, 273-274, 294-296, 332-333).

"When he accepts work that is in a dangerous condition, the immediate duty devolves upon him to make it safe; and if he fails to perform this duty, and a third person is injured, it is his negligence that is the proximate cause of the injury."

*Borgaratt vs. Pratt-Whitney Aircraft Co.*,  
(Conn.) 157 A. 860, 866.

Most certainly appellant's Motion for New Trial should have been granted for the reasons assigned and discussed. We think from an entire consideration of the entire case that the evidence and other proceedings demonstrates prejudicial error for the following reasons:

1. The evidence is wholly insufficient to justify the verdict and it is against the law.
2. The verdict was grossly and monstrously excessive, requiring a new trial.
3. The court erred in permitting the witness Smith to testify as to *duties* of one delivering electrical energy.
4. Error in giving the three instructions referred to.
5. Error in refusing to give defendant's requested instructions and special interrogatory.

Respectfully submitted.

Bryan P. Leverich

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*Attorneys for Appellant*

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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UNION PACIFIC RAILROAD COMPANY,  
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COMPANY, a Corporation,

*Appellees.*

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**Brief of Appellees**

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On appeal from the United States District Court for the  
District of Idaho

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B. W. DAVIS  
GEORGE R. PHILLIPS  
LOUIS F. RACINE, JR.  
Itex Building  
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Attorneys for Appellees

**FILED**

FEB - 8 1953

PAUL P. O'BRIEN



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*Appellees.*

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## Brief of Appellees

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### STATEMENT OF FACTS

Counsel for Appellees believe that a further statement of facts, and an explanation of the record at this point will assist the Appellate Court and be an aid in consideration of the record.

The Appellees, the Johnsons, in bringing this action were obliged to plead that by reason of the incompetency of LaVerl Johnson, he was under a legal disability and by reason of this disability was excused from bringing his action within the time limit under the Statute of Limitations in the State of Idaho (Tr. p. 7).

The Appellant denied the allegations of the Complaint in this respect, and pleaded affirmatively the Statute of Limitations (Tr. p. 11). The trial Court directed that Appellees first

meet this issue, stating that upon the pleadings alone, it appeared that the action was barred by the statute, and that unless Appellees could overcome this, it would be useless to proceed with the case on its merits.

The portion of the record, Tr. p. 43-110, deals with the physical and mental condition of Johnson and the extent of his injuries. At that stage in the proceedings, Tr. p. 110-113, the Appellant waived and withdrew its defense of the Statute of Limitations, and only such portion of the proceedings and of the testimony up to that point remain in the record as have to do with the extent of the injuries and damages to LaVerl Johnson.

It will therefore be seen that the testimony as to the negligence of the Appellant and as to the theory of both Appellees and Appellant on the question of the liability of Appellant commence with the record on page 113 of the Transcript, and it is hoped and believed that this explanation will assist in understanding the record and appreciating the progress of the trial.

While the caption of the Transcript of the record and of the Brief of the Appellant refer to Pacific Fruit Express Company, a Corporation, as one of the Appellees, this Company is not an Appellee in any sense, and all reference to Appellees in the Brief of both parties, refer to LaVerl Johnson and Joleen Johnson.

The appellee, LaVerl Johnson, was seriously injured on November 4, 1950 by coming in contact with 12,500 volts of electricity while working as an employee for the Pacific

Fruit Express Company in Pocatello, Idaho (Tr. p. 44-45). At the time of the injuries, LaVerl Johnson was 23 years of age, married to Joleen Johnson (Tr. p. 106). He was a Red Cross Swimming Instructor, enjoyed skiing, hunting and fishing and almost all outdoor activities (Tr. p. 217). Johnson was earning \$300 per month in his employment with the Pacific Fruit Express Company (Tr. p. 53). He was a high school graduate, and had had one semester of College (Tr. p. 224). Johnson was not an electrician, and had very little knowledge of electricity; he had never worked around high voltage electricity (Tr. p. 107).

The injuries, the suffering, the present condition and the probable future condition of LaVerl Johnson are all contained in the record (Tr. p. 45-113).

From the date of the accident, November 4, 1950, and for many years prior, the Union Pacific Railroad Company had been furnishing electricity to the Pacific Fruit Express Company, for a valuable consideration, and in connection with such service to its own facilities and to those of the Pacific Fruit Express Company, operated an electrical transmission system in Pocatello, Idaho (Tr. p. 349-161-114-115-189-210). The electrical foreman for the Union Pacific Railroad Company at Pocatello, Idaho, read each month the meter measuring the electricity delivered by the Union Pacific to the Pacific Fruit Express Company (Tr. p. 114). That meter was located in the enclosure of what the Union Pacific Company called the 12.5 Substation (Tr. p. 114). The Union Pacific Railroad Company monthly billed the Pacific Fruit Express Company for the electricity purchased from the Rail-

road Company and used by the Pacific Fruit Express Company (Exhibit 21). The voltage transmitted by the Union Pacific Railroad Company over its lines was 12,500 volts (Tr. p. 349), and seven substations were included in the system (Tr. p. 349). The 12,500 volts of electricity carried over the Railroad Company lines and its facilities, and into its various substations was likewise transmitted into the very substation in which LaVerl Johnson was injured on November 4, 1950 (Tr. p. 161-163-146-153). The Pacific Fruit Express Company, prior to November 4, 1950, had no electricians employed at Pocatello, Idaho, and the Union Pacific electricians did the Pacific Fruit Express electrical work; this specifically included the substation in which LaVerl Johnson was injured (Tr. p. 117-120, 125-130, 133-137, 161, 169, 171). Employees of the Pacific Fruit Express Company were instructed to call the Union Pacific Railroad Company upon occurrence of electrical difficulties (Tr. p. 109, 118, 127, 133, 137-138, 305). Not only did various employees of the Pacific Fruit Express Company on various occasions call the Union Pacific Company for electrical service and repairs, but on various occasions over a period of years the record shows that Union Pacific electricians had been in and did repair work in the substation in which Johnson received his injuries (Tr. p. 114, 117-118, 120, 122, 125, 129, 131, 134, 161, 215, 292, 305, 355). On November 4, 1950, prior to the accident, a Union Pacific Electrician had been in the substation (Tr. p. 134, 136, 138, 139, 140). Various employees had observed Union Pacific Maintenance of Way Trucks along side the substation, with men unknown to them,



working inside the substation (Tr. p. 120, 122, 126, 129-130, 131, 215).

Although electricians of the Union Pacific Railroad Company were frequently in the substation in which LaVerl Johnson was injured, railroad electricians made no inquiry or attempt whatsoever to determine any of the qualifications of the people who were in and around the substation in which LaVerl Johnson was injured, and into which the Railroad Company sent 12,500 volts of electricity (Tr. p. 114-115, 118-121, 123), and at such times as unqualified persons were in the substation with personnel from the Union Pacific Railroad Company, no inquiry was made to determine whether or not those persons were qualified or unqualified (Tr. p. 129, 131). The lead lineman of the Union Pacific Railroad Company electrical road crew, who was in charge of the electrical work in Pocatello, and under whom worked eleven electricians (Tr. p. 341), was familiar with the substation by reason of having observed it, been in it and knowing thoroughly the construction of the substation (Tr. 349-350). Likewise, the electrical foreman of the Union Pacific Shops, who regularly read the meter at this substation had been in the substation on many occasions inasmuch as the meter at the Pacific Fruit Express Company ice plant was located inside the enclosure of what was called the 12.5 substation (Tr. p. 114).

On the date of the injuries, LaVerl Johnson, as an employee of the Pacific Fruit Express Company, and as from time to time, employees of that Company in the past had worked inside this substation, was assigned to work in it,

for the purpose of painting lead wires (Tr. p. 108). Immediately after LaVerl Johnson had lunch on November 4, 1950, he went to the substation and received his injuries when he began to paint a wire in said substation (Tr. p. 110). This wire led to a lightning arrester carrying 12,500 volts of electricity, which sat  $3\frac{1}{2}$  feet above the ground (Tr. p. 162). The pole-top switch located in the substation, and as shown by exhibits 14, 16 and 17, as well as exhibit 20, did not disconnect the load of electricity running into the lightning arresters, although it did disconnect the load of electricity running into the transformers (Tr. p. 163, 165-166, 175, 196-197). To kill all of the electrical energy in this substation, it was not only necessary to pull the so-called pole-top switch, but it was also necessary to disconnect by means of a hot stick a series of disconnect switches leading to the lightning arresters (Tr. p. 164-165, 175, 196-197).

The superintendent of the Pacific Fruit Express Company ice plant on November 4, 1950 did not know the pole-top switch did not disconnect all of the power, both in the transformers and the lightning arresters (Tr. p. 299). He was one of the men who let the meter man from the Union Pacific into this substation once a month (Tr. p.293). There was no hot-stick located in the substation for the purpose of pulling disconnect switches (Tr. p. 171-172). Hot-sticks are customary equipment for substations (Tr. p. 172). The type of lightning arrester used in the substation was known as the dry-type, and had been outmoded for many years (Tr .p. 241-243, 201,202). No barriers existed around the lightning arresters themselves inside the enclosure of the substation, and

such was a requirement under the National Electrical Safety Code (Exhibits 24 and 25, exhibits 14, 16, 17 and 20; Tr. p. 180-181-196-197). There were no warning signs, either in connection with the Pole-top switch or the disconnect switches advising that it was necessary to pull both the pole-top switches and the disconnect switches to turn off all the power in the substation (Exhibits 14, 16, 17 and 20; Tr. p. 206). The State Electrical Inspector for the State of Idaho stated that in his opinion, this substation was hazardous because the 12,500 volt conductors of electricity were within reach of any person who might be inside the enclosure, whether authorized or otherwise (Tr. p. 173, 178). He also stated that the general practice and the safety code require, with respect to lightning arresters of the type there used, mounting of the lightning arresters on a high pedestal, beyond reach, and enclosed in barriers (Tr. p. 180), and stated that switches are required to be marked in such a way that they will indicate whether they are open or closed (Tr. p. 181). Elmer V. Smith, qualified as an electrical expert, testified that conductors of electricity within reach of anyone in the station, the lack of labeling on the disconnect switches and devices, (Tr. p. 195-197), the lack of barriers and enclosures around the arresters themselves within the enclosure of the substation, a failure to tie in, or have tied in, the disconnect switches with the pole-top switch, so that one switch would kill all power in the station, were all hazardous conditions, rendering this substation unsafe (Tr. p. 195-198). These matters were all readily ascertainable to a qualified and experienced electrician. (Tr. p. 181-197). Without exception those persons quali-

fied as experienced electricians, stated that it would not be proper for anyone but a qualified person to enter the substation except in company with or under the supervision of a qualified person (Tr. p. 184, 197-198, 246). A District Foreman for the Idaho Power Company stated that substations of that kind in the Idaho Power Company would have either been eliminated or a barrier or other isolation would have been put around the lightning arresters themselves (Tr. p. 239).

The meter which measured the electricity coming into the substation from the distribution lines of the Union Pacific Railroad Company, was located on what is termed the 2300 volt side of the secondary side of the transformers (Tr. p. 167). The electricity which injured LaVerl Johnson was the 12,500 volts of electricity carried on all of the Union Pacific Railroad Company transmission lines in Pocatello, Idaho, and was not the 2300 volts of electricity which was being purchased by the Pacific Fruit Express Company (Tr. p. 162-163).

The Union Pacific Railroad Company has continued to operate in carrying on business with the Pacific Fruit Express Company under the agreement set forth in Exhibit 26, and as the operating Company of all of the property of the Oregon Short-Line Railroad Company (Tr. p. 270-271, 273-275; and Exhibit 29).

## ARGUMENT

Naturally the theory of the Appellant is vastly different

from the theory under which the Appellees presented and tried the case. The primary question, as the Appellees view the matter, is whether or not the record supports the verdict and judgment awarding damages for the personal injuries received by the appellee, LaVerl Johnson, where the Appellant, as owner of an electrical distribution system, carrying 12,500 volts of electrical energy, with knowledge of dangerous and hazardous circumstances existing in a substation, sold, furnished and delivered to the Pacific Fruit Express Company, electrical energy. To determine this issue or primary question first requires: A. An appreciation of the duty resting upon a company such as Appellant distributing electrical energy; B. The actual hazardous and dangerous conditions that did exist in the substation in question; C. The notice and knowledge which the Appellant actually had of those conditions. Consequently, we will first consider those three problems in our presentation of the argument, and will thereafter discuss the auxiliary questions raised by the Appellant as to: D. The alleged excessiveness of the verdict; E. The alleged errors in the rulings on evidence; F. Alleged errors in instructions.

#### A. A DISTRIBUTOR OF ELECTRICAL ENERGY HAS THE DUTY OF EXERCISING THE HIGHEST DEGREE OF CARE.

A study of Appellant's Brief indicates that its argument is founded on the theory it in no way was a distributor of electrical energy. Necessarily then, a consideration of the entire record relative to this particular matter must be had. The Superintendent of the Pacific Fruit Express Company plant testified directly (Tr. p. 210) that the Pacific Fruit

Express Company purchased its electricity from the Union Pacific Railroad Company and Exhibit 21 was identified by the Superintendent of that Company as a billing received by the Pacific Fruit Express Company from the Union Pacific Railroad Company for electrical energy furnished by Appellant. The same witness further testified (Tr. p. 211) that regular monthly billings of the same nature were received by his company from the Union Pacific Railroad Company. Earl R. Gilbert, District Foreman for the Idaho Power Company, testified that the electricity received by the Pacific Fruit Express Company in Pocatello is tapped off the Union Pacific Batiste Line (Tr. p. 161).

Auburn C. Taylor, the lead electrician of the Appellant at the time of the accident in Pocatello, Idaho, with eleven electricians under his supervision, testified directly that the Union Pacific Railroad Company had its own transmission lines, distributed 12,500 volts of electricity through some seven substations (Tr. p. 349). Taylor also testified that if the Pacific Fruit Express Co. needed electricians, either day or night, someone would be furnished to them (Tr. p. 355). Erving J. Eskelsen, electrical foreman for the Union Pacific Railroad Shops at Pocatello, testified that he read the meters measuring the delivery of electricity by the Union Pacific to the Pacific Fruit Express Co. in Pocatello each month for seven years (Tr. p. 114). Under these circumstances there is no doubt as to the furnishing and distribution of electrical energy by the Appellant to the Pacific Fruit Express Co.

Exhibits 22 and 23, as introduced in evidence, were general orders of the Public Utilities Commission of the State of

Idaho relative to the adoption of the Bureau of Standards Handbook as to electricity. Exhibit 24 was the National Bureau of Standards Handbook H32. Exhibit 25 was the Idaho Minimum Safety Standard Practice Handbook, as adopted by the Idaho Industrial Accident Board on the 27th day of April, 1950. Section 211 of the National Bureau of Standards Handbook, page 32, provides:

“All electric lines and equipment shall be installed and maintained so as to reduce hazards to life so far as practicable.”

It is Appellant's view that there is nothing to be decided, and that there was nothing to be determined by the jury or the trial Court in so far as the factual situation is or was concerned. If the matter is or was as simple, the matter should not have been presented to a jury.

The facts are, however, that the case was tried with great care and deliberation on the part of the trial Judge, and the record is amply sufficient, conceding that there is a conflict of testimony on some important issues, to uphold and justify the verdict of the jury in finding that the Appellant was liable under the instructions which correctly stated the law of the case.

It was not the condition of the lightning arresters, or the fact that they were not barricaded and did not comply with the Safety Code, or that the pole-top switch did not de-energize the station that caused the injuries to LaVerl Johnson. It was the electrical energy that caused his injuries, and that electrical energy was transmitted by the Appellant. If no elec-

trical energy had been directed into the lightning arresters, there would have been no injuries, no claim of negligence and no litigation. All of the energy or current up to the point where LaVerl Johnson was injured belonged to the Appellant and it was not that electrical energy that was paid for, by the Pacific Fruit Express Company.

The Appellant in the trial undertook to meet the issue of having been called repeatedly to service the electrical equipment and the electrical needs of the Pacific Fruit Express Company, fully realizing its responsibility if the Appellees maintained their contention under the theory upon which they tried the case.

The Appellant was unable to successfully meet the proofs submitted by the Appellees and the most that can be said is that it was a question for the jury.

The authorities place a positive duty upon those who have electricity under their control to exercise the very highest degree of care and Appellant, in an attempt to relieve itself from duties which the Courts have so unanimously placed upon those dealing in electricity, attempted to lay great stress upon the fact that it and its employees did not have control of the key to the substation. Rather than this being a circumstance to its advantage, it is to the contrary, and is most damaging. Mr. Eskelsen, an experienced electrician employed by the Railroad, knew that unskilled non-electricians were in control of the substation into which his principal transmitted 12,500 volts of current and Eskelsen knew that the substation was on land owned by his principal, that it was dangerous, hazardous and out-moded, and he knew that any layman would



have a right to believe that the pole-top switch would de-energize the entire substation. He knew that the arresters were in reach of any person and that they were hazardous and dangerous. He knew these matters because he was a qualified electrician and because such matters, according to the testimony, were readily ascertainable by any qualified electrician.

Shoup had a key, and he didn't know that the pole-top switch would not de-energize the substation, and Eskelsen made no inquiry whatsoever and did not interest himself in whether or not Shoup was qualified. The testimony also shows that the Pacific Fruit Express Company did not have electricians and on page 35 of the Transcript, in the examination of Mr. Auburn Taylor, the electrician upon whom the Appellant so greatly relies, where an objection had been made by the Appellant to a question as to whether or not the Pacific Fruit Express Company had any regular or competent electricians, the Court stated:

"It may be immaterial, but I think all of the officers and the supervisors who testified said that they didn't have any (electricians) and I think it is recognized that they did not. \* \* \*".

No objection was made to the Court's remark in that regard, and it was recognized from the beginning and throughout the trial that the Pacific Fruit Express did not have any electricians in its employ; that when electricians were called the telephone number 268 was the number posted, and that was the telephone number of the Appellant, and the employees at the Pacific Fruit Express Company knew that they were to

call the Union Pacific Railroad Company electrical department should any electrical service be required.

All of these facts regarding the electrical service furnished by the Railroad to the Pacific Fruit Express Company were circumstances the jury was entitled to consider with all of the other evidence as to the notice and knowledge of the Appellant.

It is not without significance that the Appellant did not ask any electrician or expert in the trial of the cause as to the dangerous and hazardous situation existing at the substation or as to what the practice of one furnishing electrical energy under such conditions would be. The Appellant was obliged to content itself with asking merely if there was anything "defective" about the substation. The questions asked by the Appellant of the various witnesses never were to the direct issue involved. No witness was asked by the Appellant whether or not under circumstances where unqualified men had keys to this substation and where it was known that they were entering the substation was it the practice for a distributor of electrical energy to continue to supply high voltage into such a substation.

The fact that the Appellant had no independent right of entry into the substation and that it was required to procure a key, makes no difference at all if after acquiring a key, and if after repeated entry into the substation the Appellant, through its agent found out and was charged with knowledge that the substation did not comply with the law of the National Electric Code and was dangerous and hazardous.

Appellant is a Railroad and an efficient one, but they decided to go outside of their field and enter into the distribution of electrical current in large amounts. However, the Railroad still demands that their use of electricity and their distribution of electricity be considered as a part of the transportation business, and that they should not be held to or governed by the law applicable to those distributing electrical energy.

Having tried the case upon the theory that the Appellant had nothing to do with the substation and had no responsibility in regard to it, and had no duty as to any electricity transmitted into the substation, the Appellant can only be entitled to a reversal if the law is that one distributing and selling electrical current cannot be liable, regardless of knowledge or notice of hazardous, dangerous and perilous conditions.

That is not the law.

In *Hagen & Cushing v. Washington Water Power Co.*, 9th CCA, 1938, 99 Fed. 2d 614, the Court said, at page 617 of the opinion:

“The Supreme Court of Idaho has declared that: ‘Electricity is recognized as one of the most destructive agencies we have, and the highest degree of care and diligence is required by those who are operating electric plants in order to avoid injury to person and property’ \* \* \* thus, the question is whether or not there is any substantial evidence that Appellee breached its duty to use ‘the highest degree of care and diligence \* \* \* in order to avoid injury’ to Appellant’s property.”

The Court then said:

“The rule in the Federal Court is that \* \* \* where uncertainty arises either from a conflict of testimony or because the facts being undisputed, fairminded men may honestly draw different conclusions from them, the question is not one of law, but of fact to be settled by the jury \* \* \* .”

In *Shank v. Great Shoshone and Twin Falls Water Power Co.*, (9th CCA) 205 Fed. 833, the trial Court granted a Motion for non-suit in an action to recover damages for personal injuries received by the Plaintiff in moving a derrick along a public highway near Buhl, Idaho, when the derrick came in contact with power transmission lines of the Defendant. The highest point of the derrick was 27 feet 6 inches from the ground, and Defendants wires crossed a portion of the highway at the point of the accident, were not insulated and carried 23,000 volts of electricity, with the closest wire 27 feet 3 inches from the ground. The Circuit Court reversed, citing and discussing many cases, holding that electric companies are bound to the highest degree of care. The Court also quoted with approval from *Railroad Company vs. Stout*, 84 U. S. 657, 663, 21 L. Ed. 745:

“Upon the facts proven in such cases (cases where the proof is clear and certain), it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used

and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they themselves have seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that 12 men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

*Ellis v. Ashton & St. Anthony Water Power Co.*, 41 Ida. 106, 238 Pac. 517, was cited in the *Chase v. Washington Water Power Co.*, 1941, 62 Idaho 298, 111 Pac. 2d 872 case. That decision, in part, said:

"'Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect is not apparent to ordinary observation, and the public therefor, while presumed to know that danger may be present, are not bound to know its degree in a particular case. The company, however, which uses such a dangerous agent, is bound, not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in the proximity of its wires and liable to come accidentally or otherwise in contact with them'." (*Aurentz v. Nierman*, 76 Inc. App. 669, 131 N. E. 832.)

*Staab v. R. M. Bell Tel. Co.*, 23 Ida., 314, 129 Pac.

1078, was an action for wrongful death where an employee of the R. M. Bell Telephone Co. was electrocuted while working on a telephone line close by electric light wires, and the negligence alleged was the failure to properly insulate the electric light wires with the knowledge that telephone line men would be required to come in close proximity to such power lines. The Court there said:

“The appellant was engaged in the business of generating, transmitting and distributing the most dangerous and least understood article known to the business or commercial world, namely electric energy—an unseen force and it was chargeable with the legal duty of so handling it as to protect the public and especially those who might be called upon to come near or in contact with its wires from dangers they could not see and which they might readily overlook  
\* \* \* .”

In *Chase v. Washington Water Power Co.*, 1941, 62 Ida. 298; 111 Pac. 2d 872, the Defendant power company maintained a high tension transmission line and there was a guy wire running some distance down to the ground and coming in contact with a wire fence. It was found that two chicken hawks engaged in aerial battle interlocked their talons, and while so attached, one touched the high tension line and the other touched the guy wire transmitting electricity by a connecting link down through the guy wire and down into the barbed wire fence which transmitted said electricity and started a fire, and ultimately the barn some distance away was destroyed. The Court said:

“It is admitted that the highest degree of care must be exercised by those engaged in the generation and dis-

tribution of electricity \* \* \*."

"\* \* \* In the light of these authorities, and viewing the actions of the chicken hawks in retrospect, it can be seen that the Appellants' negligence in permitting the uninsulated guy wire to remain in contact with the wires in the fence were the decidedly contributing factors in bringing harm to respondent. The record shows that hawks abound in the territory through which appellants' power line passes, and that upon other occasions birds caused disturbances in the transmission of electricity by way of these wires. While, from an anticipatory point of view, the exact manner in which these hawks interfered with the wires upon this occasion may seem unusual or extraordinary, viewed in retrospect it cannot be said to have been unforeseeable."

"A result of the actor's tortious conduct may be one which, either in its extent or the manner in which or the sequence of events through which the conduct operates to bring about the harm, is altogether different from the result which the actor at the time of his negligence recognized or should have recognized, as likely to result therefrom. Nonetheless, after the event, such a result may not appear to the court or jury to be so highly extraordinary as to prevent the actor's conduct from being a substantial factor in bringing it about." (Restatement, 2 Torts 1165, Sec. 433, page 1167; see also Restatement, 2 Torts 1165, Sec. 431, page 1159).

"General practice in maintaining and operating electric power line will not excuse negligent act unless such practice is consistent with due care."

"\* \* \* in addition, the evidence established that the appellant negligently permitted a condition to arise in the appliance with which it conducted this dangerous energy into vicinity of respondent's property, which made it inevitable that injury would result to the respondent, if, in any manner, the electricity should

escape from the high voltage transmission wire to the guy wire."

Finally the Court said:

"Considering all the facts shown by the evidence in this case, the question whether the appellant was negligent, and whether its negligence was a proximate cause of respondent's injuries, was not one of law for the court, but of fact for the jury, and the jury, having by its verdict determined that question against the appellant, their findings should not be reversed."

In 18 Am. Jur-Electricity, Sec. 48, page 443, it is said:

"The degree of care required to be used in the production, distribution, and use of electricity a force concerning which about the only thing certainly known is its highly dangerous character, is stated in various terms which, perhaps, convey merely one idea. To declare that the utmost care must be used to prevent injury sounds different in statement than to say that ordinary care must be used in view of all of the circumstances; but when analyzed, the meaning is not far different, for the ordinary care required under the circumstances is relatively a high degree of care when put into practice \* \* \* According to numerous decisions, where the wires maintained by a company are designed to carry a strong and powerful current of electricity, so that persons coming in contact with them are certain to be seriously injured, if not killed, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its plant to prevent such injury \* \* \*"

Appellant relies on Exhibit 26, (Tr. p. 161).

Exhibit 26, Clause 4 of that agreement, reads as follows:



"The Pacific Company agrees to pay the Railroad Company for the electric power delivered under this agreement the same average rate per kilowatt hour as the Railroad company pays to the Idaho Power Company, plus 10 % which is to include the transmission line and transformer losses and the fixed charges and maintenance on such railroad equipment and apparatus as is used by the railroad company for delivering electric power to the Pacific Company."

Clause 5 of that agreement reads:

"The Railroad Company will install and maintain, at the expense of the Pacific Company, standard meters to measure the electric service used by the Pacific Company and will inspect such meters from time to time."

Under that agreement the Railroad Company also reserved the right to test the meters at its own expense at any time (Clause 6 of Exhibit 26, Tr. p. 316). Likewise, under Clause 1 of that agreement, reading as follows:

"The Railroad Company will construct the pole and wire lines and a 600 KVA transformer station necessary for the delivery of power at approximately 2300 volts and 60 cycles to the Pacific Company hereunder. Maintenance, repairs, renewals and changes in said construction shall be made by the railroad company at the cost and expense of the Pacific Company."

the Railroad Company agreed to deliver to the Pacific Fruit Express Company electrical energy and to assume the responsibility, at the expense of the Pacific Fruit Express Company, for the maintenance and repair necessary to the delivery of such electrical energy through apparatus used.

This same agreement, Exhibit 26, reserved to the Railroad the right at any time to generate in its own plant all or part of the electric power used at the Pocatello terminal, and the Pacific Company agreed to pay to the Railroad Company for electric power delivered under the terms thereof at such new rate as may be specified by the Railroad Company (Tr. p. 318). Absolutely nothing in the record establishes that this agreement was ever cancelled or that the Pacific Fruit Express Company does not continue to take its power from the Union Pacific Railroad Company under and by virtue of this agreement. In fact, the proof is directly to the contrary inasmuch as the witnesses testified, without dispute or contradiction, that the Pacific Fruit Express Company does purchase its electricity from the Union Pacific Railroad Company, and witness Arter testified that Appellant had taken the place of the Oregon Short Line Railroad Company under the agreement, and was carrying on in their stead (Tr. p. 270). See also testimony of witness Meyers (Tr. p. 222-224). Furthermore, a study of Exhibits 27, 28 and 29 shows that the real estate upon which the substation was located is owned by the Oregon Short Line Railroad Company, and that that property has been leased to the Union Pacific Railroad Company, as well as all other railroad properties of the Oregon Short Line Railroad Company, and that in turn, the Union Pacific Railroad Company has leased the real estate to the Pacific Fruit Express Company. However, the theory of liability of the Appellant does not proceed upon the basis of landlord and tenancy, but the theory of the Appellees has been and is now that the Appellant is liable under the facts and circumstances of this case and that

the verdict and judgment are wholly proper in view of the transmission of energy by the Union Pacific Railroad Company and its resultant duty under the circumstances of the case.

Completely contrary to the general theory of Appellant's Brief, the Appellees did not bring this action, nor did they try the case upon a theory of negligence because the Appellant did business with the Pacific Fruit Express or because the Railroad Company built and constructed the substation in the first instance, or because the Appellant owns the land upon which the substation is located and the Pacific Fruit Express Co. leases the land from the Appellant. This action was brought upon the theory and the Appellees have a right to recover on the verdict and the judgment, because the record absolutely supports the theory that Appellant owned and controlled a complete electricity distribution system, carrying 12,500 volts of electrical energy; that its system consisted of seven substations and was presided over by an electrical foreman in its shops and an electrical foreman or superintendent of its system outside of its shops; that in using this amount of electrical energy it delivered and furnished the same to the Pacific Fruit Express Co. through its substation where most dangerous and hazardous conditions existed. The law is that where one handling electricity has notice and knowledge of circumstances or conditions creating dangerous and hazardous perils to life or property, positive action must be taken to see that such conditions are corrected, or no longer furnish electricity to such installations.

It cannot be emphasized too strongly that the 12,500

volts of electricity which injured the Appellee, LaVerl Johnson, was electricity distributed by the Appellant over Union Pacific Railroad Co. transmission lines into the substation, prior to being metered and reduced to the voltage for which the Pacific Fruit Express Co., paid (Tr. p. 162-163).

At pages 32 and 33 of Appellant's Brief, various cases are cited in support of the assertion of the Appellant that no liability can be charged to it and no duty was owed to LaVerl Johnson because it did not own, control, or maintain the appliances and the lines through which the electricity ran which caused the injuries to LaVerl Johnson. Those cases, upon careful scrutiny, show that in no instance did the Defendant have notice or knowledge of the conditions and circumstances upon which the Plaintiff asserted a duty rested.

The Appellees made no objection to the introduction of the various contracts and leases in behalf of the Appellant. They were and are not important or determining factors in this case. It was, of course, to the interests of the Appellant, if possible, to try and have this case decided upon its theory that not owning the substation, it could not have been liable and the Exhibits could serve no other purpose, and Appellant presented no other proposition in the trial, and proceeded on the theory that the question of notice and knowledge of the existing conditions at the substation and that the question of the National Safety Code provisions relative to electricity did not in any way concern the Appellant. With this position, Appellee cannot in any manner agree, and did not agree at trial. The law is not now and has never been that one distributing, furnishing, disposing of and selling electrical current in such

large voltage as was the fact here, cannot be liable regardless of knowledge and notice of hazardous, dangerous and defective conditions, and if such were the law, it would simply mean that one engaged in the distribution of and the selling of electrical energy may deliver that energy to any type of installation owned by other persons and shut its eyes entirely to all the rules and regulations with reference to safety in the distribution and handling of electricity.

In addition to the notice and knowledge which we shall hereafter discuss, and which the record shows beyond any doubt the Appellant had of the conditions in the substation, the fact is that the Appellant did repair and maintain this particular substation and on many occasions, including the very day that the accident occurred, railroad electricians had been in the substation. The record also conclusively established that any competent electrician would and could readily ascertain the hazards of the substation and the precise conditions which made it perilous upon any reasonable examination or inspection.

In *Public Service Co. v. Elliott* (1941, CCA 1st) 123 Fed. 2d 2, the Plaintiff was one of a number of High School students admitted by the Defendant electric company to the high tension room of its substation on an inspection trip of a sort that had been made for several years, and while there was injured by electricity. The Court, holding the Defendant liable, said:

“At the time the plaintiff and his classmates, to the knowledge of the defendant, entered the dangerous high tension room, defendant had control of a force

of high voltage electricity which it was causing to flow through the installations there. Hence defendant came under a duty of care to see that this force inflicted no hurt upon the licensees present—a duty that would call for either shutting off the power, or (as a more practical alternative) giving an adequate warning if it were to be reasonably anticipated that the visitors might not fully and intelligently understand the dangers lurking in the room. That the law should impose such a duty in the present case is all the more obvious from the fact that the defendant's employee, Cates, led the boys into the high tension room and thus by his positive conduct brought the plaintiff into the zone of danger."

In the reported case there were no warning signs on various appliances in the substation, and a qualified expert testified that according to recognized principles of safety in installing high voltage equipment, unguarded live parts should have a minimum vertical clearance of 9 feet 6 inches above the floor, or "well out of reach" by an inadvertent gesture of the hand. The expert stated that the installation upon which a current transformer rested could have been made higher so as to obtain the desired clearance, without impairing operating efficiency. The Court quoted with approval *Castonguay v. Acme Knitting Machine & Needle Co.* (1927) 83 N. H. 1, 136 Atl. 702 as follows:

"Negative conduct in failing to stop a force in active operation may be as careless towards a trespasser as positive conduct in putting such a force into operation. Not to shut off an electric current in a broken wire about which trespassing children are seen to be playing may be as negligent as to turn on a current under such conditions. Inaction as well as action may be negli-

gence, and intervention relates to sequence in time rather than the physical aspects of conduct. The duty and care being established, it applies to conduct of omission as well as of commission in logical conformity with the principal that relationships determine the requirement as well as the standard of care. Required to take into account a known trespasser's presence one may not carelessly cause force to be exerted against him either by active or passive conduct."

A question of contributory negligence also existed in the case and the Court said:

"Liability turns, then, upon questions of fact: (1) Would a reasonable man in Cate's position have led the boys into the high tension room without giving them emphatic warning that within easy reach of persons standing in the aisle were live exposed parts deadly, not only to the touch, but also to the near approach of a hand extended in casual gesture. (2) Was the plaintiff guilty of contributory negligence?"

Both of these questions the Court said were properly for the jury under the evidence and the Court also went on to say that although the power company had no duty to redesign its station so as to eliminate all risks to visitors, the better engineering practice as to high voltage equipment required that live exposed parts in reach of the hand should not be installed or other safeguards should be taken. The court felt that it was certainly reasonable to infer that an ordinarily careful person in the Defendant's position would have realized the risk of injury to unsuspecting visitors and therefore would not admit boys to the high tension room without explicit warning of the dangers to be encountered.

*Alabama Power Co. v. McIntosh*, (1929) Ala. 122 So. 677, involved an appeal from a jury verdict and the judgment in favor of the mother of a child who met his death from burns while working in a building and using steel wool and gasoline. While so working an electric arc flash came from a wall receptacle, igniting gasoline, causing a fire and the resultant death of the plaintiff's child. The evidence showed that the electrical fixtures had been installed by the Montgomery Electric Co. regularly employed to do the wiring for the Defendant company. The receptacle from which the electric arc came was one forbidden by the National Electrical Code. In regard to such evidence the court said at page 680 of the report:

“In connection with such evidence, the code being the expression of the matured judgment and experience of men in that business, becomes evidence of correct appliances for such places, and evidence that the use of fixtures forbidden by it is negligence.”

Various other evidence was offered by the defendant to show that the actual cause of this injury was not the absence of a proper wall receptacle, but that certain handling of the receptacle by the employees working with the deceased child had caused the electric arc and the resulting ignition of the gasoline and the fire. In that regard, the court said, page 680:

“The negligence here, if any, consisted in creating or contributing to the creation of a zone of danger to the workmen in the room.

“If installing this class of fixtures was not negligent



or wanting in due care, it would not become so by the independent negligent act of another converting it into a zone of danger not to be foreseen and avoided.

\* \* \* \* \*

"We think, if the jury found negligence in installing and maintaining this fixture, negligence in failing to take due precaution against fire, any negligence of the contractor of the same character, bringing about the immediate danger, may be considered a concurring cause, and not the supervening and sole proximate cause of the injury, and this without regard to whether such concurring negligence could be anticipated.

"In such case there is direct cause or connection between the negligence of defendant and the injury. There is a present continuing negligence endangering persons in the building, without which the accident would not have occurred. In all cases of concurring negligence, it may be said that one would not have produced the result without the other. If this be a defense, both would escape, although both would be in the wrong. The present danger caused by present maintenance of wiring in a negligent manner concurring with present negligence of another, both creating the conditions causing the mishap, renders both liable

\* \* \*"

In the reported case it was strongly contended by the defendant that the employer of the deceased child was actually in control of the premises and in control of the work going on there at the time of the injury, and that the employer was charged with the knowledge that the use of gasoline and steel wool around electrical appliances was dangerous and hazardous. The court, as to this, merely said that any charges in that regard were not justified under the evidence and that the entire matter was for the jury.

In *Snook v. City of Winfield*, 1936, Kan. 61 Pac. 2d 101, plaintiffs brought action for the wrongful death of their daughter from electricity alleged to have been negligently furnished by the defendant city. The defendant appealed. Plaintiff and various of his neighbors built their own lines to their homes under instructions from the city, and the city itself put in the transformers necessary to the service, as well as meters in the various residences involved, including the plaintiff's. After the construction was completed the city furnished electricity to the line of the plaintiff and his neighbors, charging the same amount as to patrons who resided in the city. Whenever there was trouble the city was notified and promptly sent one or more of its men who corrected the trouble. There was a history of various trouble and of the city employees coming to the homes of the various persons on this particular line and attempting to repair the difficulty. After one such occasion the radio in plaintiff's home burned out; plaintiff disconnected wires running from his pump to the ceiling of the basement, following the occasion of the radio burning out. The following morning his daughter went to the basement, a crash was heard, upon investigation the daughter was found dead, with a burned place across the inside of her hand, apparently from the wires disconnected by the plaintiff the night before. Testimony was offered to the effect that the transformer, located about 45 rods from the Snook house, was not properly installed or operating and a strong current of electricity had been grounded. At the trial the city's theory was that the plaintiff and others had paid the cost of constructing the line and installing the transformer

from which the electricity was taken from the city's high line, and had at their own expense also wired their buildings and put in their electrical equipment; that as a consequence the city merely delivering electricity to the plaintiff, with no ownership or control over the distribution lines from the point of the city's high line, and with no notice that the apparatus was out of repair, was not liable for injury or damage which occurred on the distribution lines or equipment of the plaintiff. The court said at page 104:

“\* \* \* The actual ownership of a distribution line is comparatively unimportant insofar as liability is concerned. The principal thing is the control of its upkeep and repairs. Here, while it is clear that Snook and Caldwell paid for the construction of this line, after it was constructed, the city took charge of it for the purpose of distributing electricity over it. Snook and Caldwell were told if anything went wrong with it to inform the city; that it would look after troubles on the line. In this case the City Manager testified that the city intended to give these customers the same service given the customers in the city. The city had done that ever since the line had been built. It had taken out one transformer and put in another without saying anything to Snook or Caldwell about it, and at various times made repairs necessary for the proper functioning of the electric current it sold them.

“Irrespective of ownership or control of the distribution lines and appliances, there is testimony that the defendant knew there was something seriously wrong at the Snook place. \* \* \* With knowledge of these defects the city continued to supply electricity to the Snook home. Even if one who generates and sells electricity does not own or control the wires or apparatus over which it is distributed or used, the

exercise of due care requires that it should not supply electricity over known defective wires or appliances. These facts distinguish the case before us from the Hoffman case (*Hoffman v. Power Co.* Kan 138 Pac. 632, cited by appellant at page 32 of his brief) and others of like import."

*Bristol Gas & Elec. Co. v. Deckard*, 1926, CCA 6, 10 Fed 2d 66 further illustrates the duty. There, plaintiff's decedent was found dead under conditions suggesting his death by an electric current while attempting to start a machine by placing his hand on the handle attached to the starter box. The deceased was employed by a brick manufacturer and the defendant furnished the power to the brick company for operating the brick making machinery. Jury found for the plaintiff and the judgment was affirmed on appeal. The defendant there tried its case on the theory that the defendant had no duty to inspect or keep the brick company's machinery in repair, that the line over which the operating current was transmitted from a point outside the brick plant to the plant was owned and controlled by the brick company and that such ownership and control of the machinery and the transmitting line by the brick company relieved the defendant of any duty. In that regard the court said: page 67—

"\* \* \* Knowledge by defendant of the alleged defective condition of said wiring and appliances and its continued furnishing of electrical current after and with such knowledge would make it liable for the death of decedent caused thereby. (Cases cited). Under such circumstances defendant's duty to exercise due care to protect the employees of the brick company would be the same as that required to safe-

guard the traveling public from over hanging wires. Denver Consolidated Elec. Co. v. Walters, Colo. 89 Pac. 815."

The court next concerned itself with the question of whether or not there was substantial testimony tending to show that the defendant knew of the defective condition of the wiring as being such as it might reasonably have apprehended was liable to cause injury or death to the brick company's employees through the continued flow of the current into the plant. On this phase, testimony shows that about a year before the death of plaintiff's decedent a transformer on the starter boxes burned out and that this had been caused by a leaky roof, but that after new wires were installed, nothing was required by the electric company of the brick company to repair the leaky roof. Testimony showed that the defendant electric company had knowledge that some shocks were had at the brick plant on rainy days, and the record does not show that the defendant took any steps to have the leaky roof remedied or even to advise the brick company of the condition. From such testimony, the court, page 68 of the report, said:

"\* \* \* We think it was open to the jury to find that defendant had knowledge of conditions making unsafe the use of the wires and appliances in and about the starter box, and that defendant should reasonably have apprehended that one attempting to take hold of the handle to start the machinery was likely to receive a dangerous electric shock, and that, in continuing with this knowledge, to supply a current of 2300 volts (which it scarcely need be said is a deadly current) was guilty of negligence caus-

ing decedent's death."

The defendant electric company argued that it was as reasonable to suppose that a lightning charge had caused the death as the leaky roof and the wet motor. However, the court merely said that "considering the testimony in the case and its aspect most favorable to plaintiff, we think the case was rightly left to the jury."

The court further said:

"We find no error even if the proximate cause of decedent's death was the combined and concurring negligence of the defendant and the brick company."

In reviewing instructions the appellate court had occasion also to approve the trial court's remark in refusing one of such instructions, and that was that the question was merely whether they sent the amount of electricity in there under such circumstances that they might have anticipated trouble, and said the remark was not one that could have misled the jury.

*The Bristol Gas & Elec. Co.* case just discussed is of importance and is authority in the present case, for there nothing appeared actually defective in the sense of frayed wires or faulty fuses or other such matters, but the matter was simply that the electrical company there furnished power and electricity to the brick plant knowing that the brick plant had a leaky roof which did and would cause on such occasions as it did rain, electrical shocks in the transformer and in the various motors and machinery employed in the plant. In the

instant case the Union Pacific Railroad Company had absolute knowledge and notice of the fact that the substation here was improper, as we shall later demonstrate and as the record so fully shows. That is, the railroad company knew that unqualified persons were going into this substation, where no barriers were around the various lightning arresters and where other wires were exposed and within reach of any person within the substation; where, also, the railroad company knew that no warning signs were on the switches and nothing showed the uninformed that the pole-top switch did not kill all of the power in the substation and that it also required the operation of the disconnect switches to kill the power going into the lightning arrester. Likewise, the various employees of the railroad company who appeared at the substation from time to time had knowledge or should have had knowledge that no hotstick was available in the substation with which to disconnect the 12,500 volts of electricity going into the lightning arresters which were located within some 3 feet 6 inches of the ground.

Appellant, at page 32 in its brief and elsewhere, makes a great point of the fact that there were no defects in the case at Bar, and asserts that the knowledge of hazardous, dangerous and perilous conditions in the substation, in the absence of actual defects as such, placed the railroad company under no duty to stop the electricity going into the substation or to require that the Pacific Fruit Express Co. correct the perilous and hazardous conditions. This is a mere play on words. The definition of defect from *Funk & Wagnall's new practical Standard Dictionary* is as follows:

*Defect*, noun—1. Lack or absence of something essential.

As heretofore pointed out, it is obvious that there was a lack of something essential, to wit, among other deficiencies, an enclosure within an enclosure, and a proper pole-top switch. Defective is also defined as follows:

*Defective*, adj.—1. Uncomplete or imperfect.

The same comment runs to the definition of the word defective. The definition of hazardous is as follows:

*Hazardous*, adj.—1. Exposed to, exposing to or involving danger or risk or loss.

And the definition of dangerous as given by the same authority:

*Dangerous*, adj.—1. Attended with danger, hazardous; perilous; unsafe.

The basic criticism of appellant's brief is that throughout it has only given but half of the rule as to the duty of those transmitting electrical current. That is, it has cited at page 31 of its brief the rule in 20 C. J. page 364, Sec. 49; 29 C.J.S. 611, Sec. 57-a, and the rule in 18 Am. Jr. 498, Sec. 102. But an examination of the additional portion of each of those texts will disclose the following:

20 C.J. Sec. 49, page 365: "Whatever the rule may be in this regard, knowledge of the defective and dangerous condition of a customer's appliances would charge even a mere generator and supplier of electricity with liability for consequences, where current



is thereafter supplied to such defective and dangerous appliances. \* \* \*

And in 29 C.J.S. Sec. 57, page 57, the same text is found, with the following addition:

“\* \* \* in which case it is the energizing of the line with knowledge of the conditions, and not the conditions themselves which forms the basis of liability.”

And in 18 Am. Jur. Sec. 102, page 498, the rule is expressed as follows:

“It is generally held that where the electric wires or other appliances which have caused injury are not owned or controlled by the company furnishing the power such company is not liable for the damage sustained. The company furnishing the current is not bound to inspect such lines, wires and appliances to discover the defects in installation or other dangerous conditions; and unless the current is supplied with actual knowledge of such conditions, its responsibility ends when connection is properly made under proper conditions and it delivers the current in a manner which will protect both life and property. \* \* \*

“Where control, or even joint control, of the appliance is reserved and exercised by the company furnishing the power, such company will be liable for a lack of due care. Also, where an electric company engaged in distributing electricity sells and installs electrical equipment and engages to furnish current therefor and keep the equipment in repair, it is liable for negligence in respect thereto. \* \* \*

In *Null v. Elec. Power Board of City of Nashville*, 1948,

Tenn. 210 SW 2d 490, the rule is expressed in this fashion, page 492:

“Where a company merely transmits its electric current from its line to the consumer’s wires, which it did not install and does not control, it has no duty to inspect such wires and is not liable for injury caused by defects in them. \* \* \*

“But where a company knows of such a defect, its duty is to stop and not send its deadly current to the defective wiring of the consumer, and it is liable for injuries to person and property caused by breach of this duty. *Gas & Elec. Co. v Speers*, Tenn. 81 SW 595; *Bristol Gas & Elec. Co. v. Deckard* 6 Cir. 10 Fed 2d 66; cases cited in Annot. 134 ALR 526-529.

“In such a case the company’s duty to protect the consumer and others lawfully on his premises is similar to that which it owes the public to protect them from its overhanging lines (*Bristol Gas & Elec. Co. v. Deckard*, *supra*) and this requires it to exercise the highest or utmost degree of care \* \* \*

*Johnson v. Alabama Power Co.* 1935, Ala. 159 So. 694, at page 696, sets forth the proper rule:

“In order, therefore, to make the generator of electricity liable it must be averred and proved that it continued to furnish the dangerous current after knowledge that the purchaser permitted the electrical equipment to become defective, and therefore dangerous to life and property. Whenever such conditions exist, and the seller has notice and knowledge of it, it becomes his duty to cut off service from the purchaser; we so held in the case of *Ala. Power Co. v. Sides*, 155 So. 686.”

To the same effect cases cited at page 526 of 134 ALR; also cases set forth in 32 ALR 2d, pages 248, 249, and following. In *Oesterreich v. Claus*, 1941, Wis. 295 NW 766, the Power Co., conceded that if it had had notice of the condition there existing it would have been its duty to cease energizing the line until the owner took the necessary steps to make it safe. There the plaintiff contended that the power company was negligent where a power line ran through an orchard and the line was hidden by the trees, even though the power company did not own nor control or have any knowledge relative to the line, but merely served power to the line which was owned by a farmer. The deceased, an invitee, was injured when he climbed one of the fruit trees for the purpose of getting apples and came in contact with the line hidden in the top of the trees. The court recognized the general rule, as follows.

“When a transmission line is neither built, owned, nor controlled by a utility sought to be charged with damages arising out of its condition, such utility is neither bound to inspect the line nor obligated to respond in damages for injuries sustained by its defective construction or condition unless it supplies current actually knowing of these conditions and the current is the cause of the injuries sued for, in which case it is the energizing of the line with knowledge of the conditions and not the conditions themselves which forms the basis of liability. \* \* \*”

See also the following cases:

*Appalachian Power Co. v. Mitchell's Administratrix*, 1926, Va. 134 SE 558;

*International Elec. Co. v. Sanchez et al* 1918, Tex. 203 SW. 1164;

*Dabbs v. Tenn. Valley Authorities*, 1952, Tenn. 250 SW 2d 67;

*Aurentz et al v. Nierman*, 1921, Ind. 131 NE 832;

*Hawkins v. Lamont Hydro-Elec. Corp.* 1924, Vt. 126 Atl. 517.

B. DANGEROUS AND HAZARDOUS CONDITIONS EXISTED IN THE SUBSTATION AND WERE A PROXIMATE CAUSE OF THE INJURIES TO LaVERL JOHNSON.

Section 54-1001 of the *Idaho Code* reads:

“54-1001—Declaration of policy.—From and after the taking effect of this act, all installations in the State of Idaho of wires and equipment so convey electric current and installations of apparatus to be operated by such current, except as hereinafter provided, shall be made in substantial accord with the National Electrical Code as approved by the American Standards Association, relating to such work as far as the same covers both fire and personal injury hazards, as the same shall be compiled and published from time to time; provided that the provisions of this section shall not apply in incorporated cities and towns which by ordinance or building code prescribe the manner in which wires or equipment to convey electric current and apparatus to be operated by such current shall be installed.”

The National Electrical Code as referred to in the above

statute was introduced into evidence as Exhibit 24. That code provides, in part, as follows:

"Section 213-a, subsection 5, Handbook 32: "Defective lines and equipment shall be put in good order or effectively disconnected."

Section 93-c Handbook 32: "Mechanical protection and insulating guards shall extend for a distance of not less than 8 feet above any ground, platform or floor from which grounding conductors are accessible to the public."

Section 35, Handbook 32—"The term 'guard' means covered, fenced, enclosed, or otherwise protected, by means of suitable covers or casings, barrier rails, or screens, matts, or platforms, to remove the liability of dangerous contact or approach by persons or objects to a point of danger."

Section 211, Handbook 32—"All electric lines and equipment shall be installed and maintained so as to reduce hazards to life as far as practicable."

Section 216-b, Handbook 32—"All switches shall indicate clearly whether they are open or closed."

Section 216-c, Handbook 32—"Pole-top switches accessible to unauthorized persons shall have provisions for locking in both open and closed positions."

Section 24, Handbook 32—"Electrical supply station or a substation means a building, room, or separate space within which electrical supply equipment is located and the interior of which is accessible, as a rule only to properly qualified persons."

Section 55, Handbook 32—"The term 'qualified' person means one familiar with the construction and operation of the apparatus and the hazards involved."

Section 61-302 of the *Idaho Code* on the date of this accident and in common with all of the regulations above

mentioned, as well as the Idaho Code section cited, provides:

“Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facility that shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and shall be in all respects adequate, efficient, just and reasonable.”

An examination of the record leaves no doubt but that the Idaho Code and the National Electrical Code had not been complied with on November 4, 1950. The District Foreman for the Idaho Power Company examined Exhibit 20, which was an enlarged photograph of the substation involved, taken shortly following the accident and at a time when the conditions in the substation were the same. He, as well as the person who was State Electrical Inspector at the time of the accident, and Elmer V. Smith, an electrical expert, explained that in this substation the pole-top switch did not break the circuit of the power running into the lightning arresters, although it did kill the power running into the transformers. In other words, when the switch was open the line into the lightning arresters was still hot (Tr. p. 164-165-174-196). The State Electrical Inspector stated that in his opinion the 12,500 volt conductors within reach of any person who might be inside the enclosure, whether authorized or otherwise, would be a hazardous condition, (Tr. p. 178) and so stated because such persons might, either through a lack of knowledge or misunderstanding or through accident come in contact with those conductors (Tr. p. 179).

He further stated that the general practice where such an arrester is used is to mount them on a high pedestal or to put them beyond reach and beyond accidental contact and the safety code provides that there shall be barriers where such conditions do exist (Tr. p. 180). The code required that such barriers be provided for lightning arresters of this type even though the lightning arresters are situated inside the substation itself which is enclosed. (Tr. p. 180). Elmer V. Smith, an electrical expert, testified similarly, (Tr. p. 195-197). Mr. Gilbert, the Idaho Power Co. electrical foreman, testified that if there had been such a substation in the Idaho Power Co., they would have put a barrier or isolated those lightning arresters or eliminated them (Tr. p. 239).

All of the electrical experts testified positively that no man should have been in that yard unless he was qualified (Tr. p. 184-198-239).

Furthermore, each of the experts testified directly that switches are required to be marked in such a way that they will indicate whether they are open or closed (Tr. 181-191-192-195-197-245-246). There was nothing in that substation which would tell anyone but an experienced electrician what was dead and what was not as to the current in the substation.

Hot sticks are customary equipment for such a substation (Tr. p. 172) and in this substation there were no hot sticks (Tr. p. 171-172). Current to the lightning arrester in this substation could not be eliminated without the use of hot sticks (Tr. 175).

The lightning arresters in use in this substation were outmoded and the so-called pellet type lightning arrester was generally in use at the time of the accident and had been for a number of years (Tr. p. 201-241-243).

Without exception, the witnesses qualified as expert electricians, testified that the conditions existing in this substation were readily ascertainable and apparent to a qualified electrician (Tr. p. 181-197, 201-246).

It is not without significance that the Union Pacific Railroad Company called no experts and offered no testimony with regard to the hazardous or perilous conditions in the substation. Appellant's lead electrician was not questioned as to the hazardous or perilous condition, and appellant's witness, Melvin Judge, testified it was not safe for laborers to be in the enclosure (Tr. p. 313).

All of the cases referred to under the first heading of this argument amply illustrate that where conditions exist as shown by the record, the duty devolves upon the company, with knowledge of such conditions, furnishing electrical energy into such installations, to stop the current for the very reason that the company can foresee a likelihood of injury to person or property.

C. THE APPELLANT, UNION PACIFIC RAILROAD COMPANY, HAD NOTICE AND KNOWLEDGE OF THE HAZARDOUS AND PERILOUS CONDITIONS EXISTING IN THE SUBSTATION, AND FAILED TO TAKE ANY STEPS TO REQUIRE THAT THE PA-



CIFIC FRUIT EXPRESS CO. CORRECT THE CONDITIONS, AND IN THE ABSENCE OF SUCH CORRECTIVE STEPS TO TURN OFF THE ELECTRICAL ENERGY FEEDING INTO THE SUBSTATION.

The record abounds with notice to qualified electricians of the appellant, of the conditions in this substation. The electrical foreman of the Union Pacific shops in Pocatello monthly for seven years read the meter; his testimony is found on pages 113-115 of the transcript. Auburn C. Taylor, the lead electrician of Pocatello, Idaho, had been in the substation on a number of occasions and was familiar with the construction and the installations there, and he positively testified that Union Pacific electricians were available for service to the Pacific Fruit Express Company day or night (Tr. p. 349-355). The record is absolutely uncontradicted that the Union Pacific Railroad Co. electricians did electrical work in and around the substation and had been in the substation on many occasions. The perilous conditions in the substation were readily ascertainable and apparent to any qualified electrician, and with notice and knowledge of those conditions, appellant did not remedy the same. On the very day of the accident, a Union Pacific electrician was present at the Pacific Fruit Express Co., ice plant and particularly at the substation in question. Employees of the Pacific Fruit Express Co., testified that on various occasions they had observed Union Pacific Railroad Co., maintenance trucks pull alongside the substation and had observed men who came in those trucks inside the substation working (Tr. p. 120-126). One of these employees saw the Union Pacific

maintenance truck pull alongside the substation prior to the accident, and on the very morning of that day (Tr. p. 126). One of the foremen at the Pacific Fruit Express Company ice plant testified he was introduced to a Union Pacific electrician on the morning of the date LaVerl Johnson was injured and that that Union Pacific electrician was there prior to the power being turned off and that as a matter of fact the Pacific Fruit Express people were waiting for that man to turn up before the power was shut off (Tr. p. 134). LaVerl Johnson saw a Union Pacific maintenance truck alongside the substation (Tr. p. 215).

These facts in the record, together with the Appellant's Exhibit 26 and its various lease agreements, show positively a practice over a period of years whereby the Union Pacific Railroad Company sold, furnished and distributed electrical energy to the Pacific Fruit Express Company and undertook to and did repair and maintain the installations and appliances through which such electricity was served to the Pacific Fruit Express Company, including the substation where the energy was metered.

The Superintendent of the Pacific Fruit Express ice plant expressly testified there were no electricians on the payroll of the Pacific Fruit Express Company in November, 1950 (Tr. p. 300). An attempt has been made by Appellant to show that unqualified men changed the oil in the transformers of the Pacific Fruit Express Company. The reasonableness of that was for the jury. Expert testimony of Appellant's witness showed that that is work and a job for an electrician and a job that is not for a layman (Tr. p.

310). The Appellant is confronted with the necessity of admitting either that the proof as to work being done by laymen is not reasonable or that through Appellant's electricians it permitted this hazardous work to be done and knew it was being done by unqualified people, contrary to all the rules of safety.

The Appellant violated statutes in the State of Idaho relative to compliance with the National Electric Code, and the National Electric Code as we have heretofore discussed, provided for barriers and warning signs specifically, and was designed to protect life and property.

Idaho cases bearing on the question of concurrent negligence in point in this action are discussed.

In *McCarty v. Boise City Canal Company*, Idaho, 10 P. 623, it was held as early as 1886 that:

"A person guilty of negligence cannot avoid responsibility therefor on the ground that others are also guilty of negligence contributing to the same injury."

*Miller v. No. Pac. Railroad Co.* Idaho, (1913) 135 P. 845, in defining proximate cause holds that where two independent causes concur in producing an injury so as to contribute to the plaintiff's damage that even though one is irresponsible in its origin the defendant Railroad Company would be held liable by reason of the fact that irresponsibility or concurring cause would not alone have been sufficient to produce the injury.

In *Idaho Gold Dredging Corp. v. Boise Payette Lumber*

Co. Idaho, 37 Pac. 2d 407, it was held:

“Where damage has occurred while defendant’s own wrongful act was in operation, he cannot set up as defense that there was a more immediate cause of loss if that cause was put into operation by his own wrongful act, and to entitle defendant to such exemption he must show, not only that same damage might have happened, but that it must have happened if his negligent act has not been committed.”

*Carron v. Guido*, Idaho, 33 Pac. 2d 345, is, we believe, squarely in point on the proposition of law. This case has been reaffirmed by the Supreme Court of Idaho and is not in any way modified. The Court in this case reversed a judgment of nonsuit by the District Court. The action was one for injury to minors by reason of ammunition sold them contrary to law by the defendant’s wife. The following quotation is from the Carron case:

“The violation of a law, intended for the protection of a person and others like situated, which results in his injury and is the proximate cause of it, is negligence per se. *Curoe v. Spokane & I. E. R. Co.* 32 Idaho, 643, 186 Pac. 1101, 37 A. L. R. 923; *Smith v. Oregon Short Line R. Co.* 32 Idaho, 695, 187 Pac. 539; *Brixey v. Craig* 49 Idaho 319, 288 Pac. 152.”

The Appellant cites many cases on proximate cause and foreseeability, each of which we have carefully read and considered, but those cases are cases wherein the facts had nothing to do whatsoever with electrical energy, or they are cases wherein the facts showed there was no notice nor

knowledge chargeable to the defendant. We believe and most respectfully submit the law in this case as to the proximate cause is governed by the rule laid down by the Supreme Court of Idaho in *Chase v. Washington Water Power Co.* 1941 62 Ida. 298, 111 Pac. 2d 872, wherein it said, at page 307:

“In considering all of the facts shown by the evidence in this case, the question of whether the appellant was negligent and whether its negligence was the proximate cause of respondent’s injuries, was not one of law for the court, but of fact for the jury, and the jury, having by its verdict, determined that question against the appellant, their finding should not be reversed.”

In other words, the matter of proximate cause and questions connected therewith were properly submitted to the jury, the jury had the facts before it and as triers of the facts determined: First, that there was a duty on the part of the defendant railroad company as a distributor of electricity. Second, that the distribution of electricity and the manner in which it was done with the actual knowledge which the railroad company had or should have had of the hazardous conditions in the substation, were sufficient to pin-point the proximate cause in a causal line from the railroad company directly to the injury of LaVerl Johnson.

The *Restatement of Torts* is cited as to foreseeability. Section 435 of the *Restatement of Torts* reads:

“If the actor’s conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have seen the extent of

the harm or the manner in which it occurred does not prevent him from being liable."

38 Am Jur Sec. 23, pages 665 and 666 read as follows:

"Fundamentally the duty of a person's due care and his liability for negligence depends upon the tendency of his acts under the circumstances, as known or should be known to him. \* \* \* The foregoing principals, which emphasize knowledge, actual or implied, as a foundation of a duty to use due care, are adhered to generally by the authorities."

The railroad company, as a distributor of electrical energy to the Pacific Fruit Express Company, for a valuable consideration, having knowledge that the Pacific Fruit Express Company had no qualified electricians and that the Pacific Fruit Express Company was letting unqualified men go into the substation, it became the duty of the Union Pacific Railroad Company to see that the conditions in the substation were corrected, or to cease furnishing energy. Its failure was the proximate cause of the injuries to LaVerl Johnson, and no amount of argument and no number of cases cited can change the facts and circumstances of the case. Each case is dependent upon its own peculiar circumstances and facts. Here the facts and circumstances are such that they fall squarely within the well known rules of proximate cause and fix liability on the Appellant. The test is reasonable foreseeability.

The Appellant relies upon certain Idaho cases and especially cites *Stearns v. Graves*, 62 Idaho 312, 111 Pac. 2d

882. The present case insofar as Idaho is concerned is governed by *Valles v. Union Pacific RR Co. et al*, 72 Idaho 231, 238 Pac. 2d 1154. This case refers to and distinguishes the Stearns case.

“Reasonable foreseeability is the fundamental test of proximate cause and this rule is not changed by the existence of an intervening act or agency.” *Phares v. Carr*, 106 N. E. 2d 242.

We believe that this is a fair and correct statement of the law.

*Chatterton v. Pocatello Post*, 70 Idaho 480, 223 Pac. 389 cited by Appellant was an action for injury to a minor, a newsboy who left an automobile driven by his superior and was injured crossing the street and one of the important principles laid down by the Court was that a defendant could not be liable when complying with the law. The defendant had parked its automobile in accordance with the State Traffic Law and the plaintiff contended that the automobile should have been parked on the opposite side of the street which would have been contrary to the law.

In the instant case the Appellant is in direct violation of law and can derive no comfort from the *Chatterton* case. Also in the *Chatterton* case, the Supreme Court of the State of Idaho was discussing the proposition that negligence that furnished the condition or occasion for an injury is not sufficient where that negligence does not put in motion the agency by which injuries are inflicted.

The Appellant did put in motion the agency, the elec-

tricity, which inflicted the injury to the plaintiff.

*Stearns v. Graves* 62 Idaho 312, 111 Pac. 2d 882, is a case where the doctrine of the last clear chance was involved. The opinion has to do with the particular facts in that case and we call the Court's attention again to *Valles v. U. P. RR Co. et al*, supra, where the Supreme Court of Idaho directly referred to *Stearns v. Graves* and pointed out that it was not inconsistent with the law as quoted in the *Valles* case and we submit that it cannot in any way be controlling in this instance.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT A NEW TRIAL INASMUCH AS THE AMOUNT OF THE VERDICT WAS NOT GROSSLY EXCESSIVE OR MONSTROUS.

The Appellant spends much time in its brief, pages 49 to 57, attempting to demonstrate the monstrosity of the verdict and judgment in this case. The Appellant offered no evidence at trial relative to damages and did not argue the question to the jury. When the amount of the verdict was called to the attention of the trial Court on motion for new trial, the Court carefully considered the matter and then entered its order, (Tr. p. 31-35). The Trial Court in its order quoted from *Boice v. Bradley*, 92 Fed Supp 750, 194 Fed 2d 80, 198 Fed 2d 790, certiorari denied, 343 U. S. 941, 72 Sup. Ct. 1033. In quoting from the *Boice* case the Court quoted what it had to say in that case, and which was approved by the Circuit Court, and which thus becomes the



law in this district, as follows:

“As a broad general rule, the damages must be reasonable whether merely actual damages or actual and exemplary damages. Unless the amount is so unconscionable as to impress the Court with the injustice of the award and thereby induce the Court to believe that the jury was actuated by passion, prejudice or partiality, there will usually be no interference with the jury’s verdict. At the very threshold of this inquiry it must be remembered that the Constitution of the United States, Amendment 7, and of this State art. 1 Sec. 7, as well as all other States has secured the right of trial by jury in civil actions by the words ‘shall be preserved’ or, as stated in the Constitution of the State of Idaho, ‘shall remain inviolate’. If this mandate is to be obeyed the Court must proceed with caution when a motion such as is now before the Court is considered, with the thought in mind that if the Court is going to set aside the verdict for no reason except that the Court feels it is excessive, this Constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the Court could supplant its opinion in place of the opinion of the jury”.

In *Southern Pacific Co. v. Guthrie*, 9th Cir. 186 Fed 2d 926, this Honorable Court held that at most it could consider with respect to verdicts claimed to be excessive only whether the verdict is grossly excessive or monstrous. This rule is approved in *Bradley Mining Co. v. Boice*, 9th Cir. 194 Fed 2d 80.

The Guthrie case involved a man almost 59 years of age who had in an accident lost a leg severed between the knee and the hip for which a jury awarded \$100,000.00

The Court was unwilling to determine that such damages were excessive or monstrous. Applying the same rule, how can it be said here that the verdict is monstrous or grossly excessive in view of the loss of two legs, just below the knee, the right arm at the shoulder, with the pain and suffering, shock, incompetency, mental attitude, number of amputations, future pain and suffering, and the continual expense, where the injured party was only 23 years of age, earning some \$300.00 per month.

The decisions of this Court, as well as the Supreme Court of the United States relative to the granting of new trials for allegedly excessive verdicts, is too well established to require the citation of innumerable authorities relative to injuries of this type. We believe that the decision of the Trial Court on motion for new trial was correct and that the analysis of the factual situation here by the Trial Court with the application of the law by the Trial Court is a complete answer to the contentions of Appellant.

The Appellant seeks to minimize the suffering and the length of time that LaVerl Johnson was incapacitated, and seemingly predicts a bright future for him. In summarizing his mental condition from the Appellant's viewpoint, Appellant overlooks the important fact that Appellee was required to allege and prove that his mental condition and capacity was such that he was incompetent and under legal disability from the time of the accident until July 1, 1951. The proof in this respect (Tr. 43, 110) showed that this incompetency and disability lasted for a much longer time, and the Appellant, after hearing the testimony and being

convinced of the incompetency as a result of this accident, admitted the same and withdrew its denial thereto (Tr. 110-111).

We cite cases where comparable amounts have been awarded and approved for comparable injuries:

*St. Louis SW Railroad Co. v. Ferguson*, CCA 8th, 182 Fed. 2d 949, upholding a verdict of \$150,000.00 for the loss of a leg, an arm and fingers.

*Kieffer v. Blue Seal Chem. Co.* CCA 3rd, 107 F. Supp. 288, 196 Fed. 2d 614, where \$250,000.00 was upheld for third degree facial burns, permanently disfigured face, blindness except for 25% vision in one eye.

*Florida Power & Light Co. v. Robinson*, 1954, 68 So. 2d 406, upholding \$225,360.00 for serious back injuries and brain concussion.

It is to be noted that Appellant has cited at page 56 of its brief a case from Florida, but neglected to cite the later Florida case which we have just noted.

*Devito v. United Air Lines*, 98 Fed. Supp. 88, upheld a verdict of \$160,000.00 for the death of a 38 year old businessman earning \$9,000.00 in the year immediately prior to his death.

LaVerl Johnson has a life expectancy of approximately 40 years, and the injuries and his pain and suffering and the future which he faces are clear. Based upon the law and the facts we believe it is clear that the verdict and the judgment are proper and that the Trial Court did not abuse its judicial

discretion in refusing to find the verdict excessive.

## E. ALLEGED ERRORS IN ADMISSION OF TESTIMONY OF ELMER V. SMITH.

Appellant, at pages 57 and 58 of its brief, cites from Jones on Evidence. Actually the citation, as well as the quotation given, fails to include the exceptions to the general rule and the exceptions were found on the next page, or at page 700. The rule on exceptions to the general rule, 2 Jones on *Evidence*, 4th Ed. page 700 is as follows:

“Exceptions to the general rule—While the authorities are generally agreed that an expert witness may not be called upon to decide ultimate issues or pass upon contraverted questions of fact, there is some confusion and apparent conflict among the courts as to the application of the rule. An examination of the decisions discloses many instances in which courts, without specifically repudiating the rule, have departed from it by permitting an expert to testify directly as to an ultimate issue, or to express an opinion as to the merits of the controversy.”

The Appellants have also indicated that the law is all “one way on the subject,” page 57 of their brief. The law in Idaho is not as is cited by Appellant. We briefly review the Idaho law:

*Knauff v. Dover Lbr. Co.* 20 Idaho 773, 120 Pac. 157, is a case in which an expert witness was asked: “What is the proper method of construction in the slasher with reference to the hole about the chain where the chain goes down

through the floor?" In this case it was argued that the question called for an opinion of the witness upon an issue which should have been left to and was to be determined by the jury. The Court said at page 789 of the Idaho Reports:

"In the present case the question as to the negligence of the defendant in permitting the hole to be in the condition it was, and permitting it to so remain was for the jury to determine, and the jury might be very much aided in determining this question by the evidence that it was maintained in such a manner as to show negligence on the part of the appellant, or where the facts were such as to require of the respondent that he should expect and look for defects in the construction, condition and operation of the chains to this hole. This would not necessarily be a matter of common knowledge but would be the statements and experience of men familiar with the subject and might be a very great aid to the jury, notwithstanding the fact that the very question which the witness expresses an opinion upon is a question which the jury must pass upon; and in such cases the fact that the witness expresses an opinion upon a matter not of common knowledge in giving his testimony, is not reversible error."

The Trial Judge was following the Idaho law and stated in effect the same rule as set forth in the Knauff case heretofore quoted, by saying: (Tr. p. 193)

"I take it the only way the jury or the court or anyone else could get any information on this matter is from the opinion of experts. There would have to be some foundation for the jury to pass upon the question that would be submitted to them. The only way I know of that they could get that information would

be from physical conditions and from the opinions of experts. This man is qualified as an expert.

\* \* \* \* \*

I will let him answer."

Further, the Idaho case of *Cochran v. Gritman*, 1921, 34 Idaho 654, 203 Pac. 289, was cited with approval by the Supreme Court of the United States in *Eastern Transportation Line v. Hope*, 95 U. S. 297, 24 Law Ed. 477, in which it was stated:

"It is permitted to ask questions of the witness of this class which cannot be put to ordinary witnesses. It is not an objection, as is assumed, that he was asked questions involving the points to be decided by the jury. As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects upon which the jury are not as well able to judge for themselves as the witness that an expert as such is expected to testify. Evidence of this character is often given upon subjects requiring medical knowledge and science, but it is by no means limited to that class of cases."

The case of *Hayhurst v. Boyd Hospital*, 1927, 43 Idaho 661 is also authority for the above rule.

In addition to these matters the Appellant absolutely waived any possible error on this question, which error we do not at all concede, when it went on and did not renew its objection on other testimony given by the witness Smith, and when it cross-examined Smith regarding all of these matters. Furthermore, the portion of the record set out by

the Appellant in its brief as to the testimony to which it objects, Page 15, of their brief shows positively that the witness was not testifying to the duty but was testifying to the practice. The witness stated as follows:

“\* \* \* in my observation over previous years the power company and other distributors of electricity will not, knowingly, and if it is within their knowledge, deliver electricity to hazardous installations.  
\* \* \*”

The Court carefully instructed the jury as to the weight to be given the testimony of opinion witnesses. That instruction appears at Tr. 376-377. Appellant in no way excepted to that instruction and did not in its brief and cannot now point out any prejudicial error from the admission of the testimony of the witness Smith.

## F. ALLEGED ERRORS IN INSTRUCTIONS

Appellant in its specifications of errors, IV to XI inclusive, requests this Court to review instructions given and requested. In doing so, reference is made to the Motion for new trial, as well as the Motion for Judgment notwithstanding the verdict for the reasons alleged as error. As we understand the law in Federal Court, and in this circuit, the Appellant cannot appeal from the Order denying the Motion for new trial, or from the Order denying Motion for Judgment notwithstanding the verdict as to these matters. Its appeal is from the verdict and judgment in the trial Court, and not from any rulings on such Motion.

In *Armstrong vs. New La Paz Gold Mining Company*, 1939 CCA 9th, 107 Fed. 2d 453, the 2nd headnote reads:

"The Circuit Court of appeals would only notice appeal from judgment and not appeal from Order denying Defendant's Motion for a new trial."

*Ford Motor Company v. Motor Sales*, 1950, CCA 6th, 185 Fed. 2d 531 was an appeal from the judgment notwithstanding the verdict and the appeal was dismissed. The Court at page 533, said:

"It is likewise well settled that no appeal will lie from an Order overruling a Motion for a new trial (cases cited).

"Appeals may follow in time the entry of such on Order, but such an appeal is properly taken from the judgment previously entered rather than from the order which refused to set it aside."

At page 534 this was said:

"Applying the same general rule, it follows that an appeal may follow in time after the entry of an order sustaining a motion for the entry of judgment notwithstanding the verdict. The appeal is not taken from the order sustaining the motion, but from the judgment thereafter entered which disposes of the case. It also logically follows that an appeal may follow in time after an order overruling a motion for judgment notwithstanding the verdict. The appeal is not taken from the order overruling the motion, but from the judgment previously entered which the order did not set aside."



The challenge to the Instructions is also of no merit whatsoever for two separate and distinct reasons: 1. If error did, in fact, exist in the challenged or refused instructions, that error was absolutely waived by the Appellant, and 2. The challenged instructions as given, were correct, and they properly set forth the law; those instructions purportedly tendered by the Appellant, were properly refused.

1. Waiver of objections:

At the conclusion of the Court's oral instructions to the Jury (Tr. p. 382), the Court in the absence of the jury, inquired of counsel whether they wished to register any exceptions to the record as to instructions. Thereupon, Mr. Anderson, counsel for the Appellant, interposed a number of objections (Tr. p. 382-386). After the Court had listened to the objections made, the Court recalled the Jury, and then gave additional instructions (Tr. p. 386-387). The jury was then excused again, and the Court asked (Tr. p. 387):

The Court: Does the plaintiff feel that I have covered the matter?

Mr. Davis: Yes, your Honor.

The Court: Do you have any further objection?

Mr. Anderson: I have no further objections.

The Court: You feel that I have fully covered the matter; if you don't, then I will call them back.

Mr. Anderson: I didn't feel or rather it didn't seem to me that it had been covered when your Honor told them they should not tie the Pacific Fruit Ex-

press into this.

The Court: I also told them that in any action such as their pulling the switches or anything of that nature that the Union Pacific should not be held responsible for any of their acts.

Mr. Anderson: I think it is all right.

The Court: You are satisfied.

Mr. Anderson: Yes.

The Court: Mr. Bailiff, you may recall the jury.

(The following in the presence of the jury.)

The Court: The alternate jurors may be excused at this time and I want to thank you for the attention you have paid here, and for helping us out by standing by. The bailiffs will be sworn.

(Whereupon, the bailiffs were sworn by the clerk.)

The Court: The jury may now retire to consider their verdict.

The record points up two separate reasons for the Appellees' position that the Appellant has waived the right to objection. First, counsel failed to object to the instructions of the Court, as corrected, and secondly, the instructions as corrected, were absolutely approved by the Appellant; consequently, all objections were waived.

Rule 51 of the *Federal Rules of Civil Procedure*, provide as follows:

“\* \* \* No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. \* \* \*”

The underlying principle for the status of the law is that the trial Judge is entitled to be informed of possible errors, and given an opportunity, if necessary, to correct them. *Williams vs. Powers*, 1943, 135 Fed. 2d 153, CA 6th. The authorities on this aspect of our argument are numerous. *Boise Payette Lumber Company vs. Larson*, 1954, CA 9th, 214 Fed. 2d 373; *LeVine vs. Joseph E. Seagram & Sons, Inc.*, 1946, CA 7th, 10 Fed. Rules Service, 51.21, Case 1, 158 Fed. 2d 55.

An examination of the record after the Court corrected the charge, in accordance with the Appellant's request, conclusively illustrates that it made no further objection of any nature. It may not now complain of any prejudice. The mere fact that the Appellant had submitted requests for instructions which the Court denied, does not alter or otherwise abrogate the requirements of Rule 51. *Blair vs. Cullom*, 168 Fed. 2d 622, in which the Rule is stated as follows:

“It seems clear that Rule 51 applies and requires objections to those parts of the charge claimed to be erroneous, whether or not requests of charge have been submitted (citing cases). The fact that here they were submitted before trial rather than during it we think immaterial; as we have said before, objection must be taken ‘in order \* \* \* that the judge may clarify or correct his statement before the jury retires’.”

Not only did counsel fail to object as is required by Rule 51, but we further contend that the record, as reproduced above, shows a consent to the instructions as given.

A clear pronouncement of the applicable Rule is contained in *Wood vs. Sexton Company*, 275 Fed. 660, CCA 3rd.

In *Boise Payette Lumber Company vs. Larson*, 214 Fed. 2d. 373, this Court said:

“\* \* \* counsel subjectively may have had reservations about the instructions, yet, tested objectively, there is much validity to the proposition of Plaintiff that the Defendant consented to the instructions as given.”

2. Instructions as given correctly stated the law:

The argument of Appellant as to the instructions given the jury, which Appellant specifies as error is contained at pages 60-64 of its Brief. The challenge to the correctness of those instructions is upon the theory that there was no evidence that there was anything defective in the equipment or appliances in or about the sub-station. We believe that we have fully answered this contention in our argument contained at pages 10 to 44 of this Brief. We there point out that the law is that when a defective or hazardous or dangerous or perilous condition exists of which the one furnishing electric energy has notice, even though those conditions exist on the premises of another, and in equipment of another, that the duty of the one furnishing electricity is to require the correction of conditions or refuse to furnish elec-

trical energy into such equipment. The play on words as to the term "defect" and as to the term "hazardous" or "perilous" or "dangerous" is without any merit.

Appellant strenuously contends on page 60 of its Brief that the Court erred in instructing the Jury with reference to defective equipment, when there was no evidence as to defects.

The Court's instruction using the word "defects" and "defective" does not at all bear out the construction placed upon the same by Appellant. The particular instruction is found on page 374, Transcript. It shows that the Court merely gave to the jury a general rule of law with reference to the duty of one supplying electricity.

This instruction was clearly a guide to the jury, and not only was not unfavorable to Appellant, but if there were no defects, could not possibly prejudice them.

On page 377 of the Transcript, the Court instructed the jury as to what would amount to negligence on the part of Appellant, and it will be noted that the jury were specifically advised that:

"\* \* \* and you further find that such conditions were dangerous or hazardous to life and property, and that the Union Pacific Railroad Company continued to furnish high voltage electricity through said lines and into said sub-station, and that as a proximate cause thereof, LaVerl Johnson was injured, then the defendant was negligent."

The Appellant cannot point up anything in the instructions or any portion of any instruction that in any way advises

the jury that the Appellant could be found negligent by reason of any "defective" condition, and assuming but not admitting that the Appellant is correct in its definition and interpretation of "defective" it has no complaint whatever, either from a legal or a practical standpoint with the instructions on the subject.

## CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that no prejudicial error appears in the Record; that the verdict of the jury and the judgment entered thereon by the Court were in every respect in accordance with the law and the facts established and that accordingly, we respectfully pray that said judgment be, in all respects affirmed.

Respectfully submitted,

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IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNION PACIFIC RAILROAD COMPANY,  
a Corporation,

*Appellant,*

vs.

LaVERL JOHNSON and JOLEEN JOHNSON,  
Husband and Wife, and PACIFIC FRUIT EXPRESS  
COMPANY, a Corporation,

*Appellees.*

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## Reply Brief of Appellant

UNION PACIFIC RAILROAD COMPANY

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Appeal from the United States District Court for the District  
of Idaho, Eastern Division

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**FILED**

**FEB 28 1955**

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**C**







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UNION PACIFIC RAILROAD COMPANY

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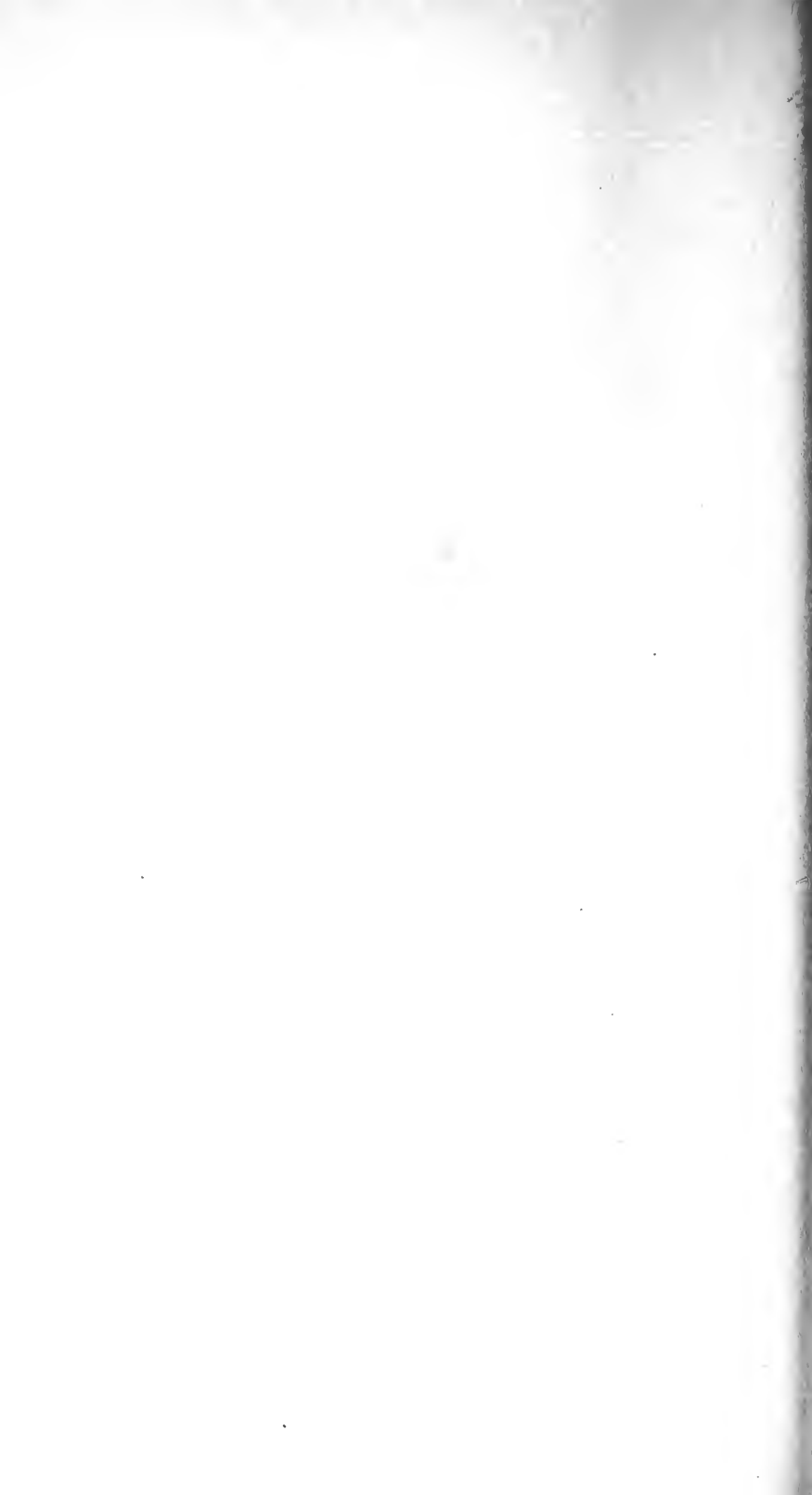
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**Reply Brief of Appellant**

UNION PACIFIC RAILROAD COMPANY

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STATEMENT OF FACTS

While we have captioned this as Statement of Facts it is merely a reply to appellees' Statement of Facts, because we believe that appellees are endeavoring to claim more for the facts asserted by them than the record really supports.

Appellees contend that the Pacific Fruit Express Company, prior to November 4, 1950 had no electricians employed at Pocatello. This should be corrected to show that they did have an electrician prior to and on November 4, 1950, Melvin Judge was its electrician (R 307).

It is questionable, in fact we think the testimony will not support a statement, that a Union Pacific electrician had been

in the substation on November 4, 1950 prior to the accident. We think there is no substantial evidence to support this, but to the contrary the evidence, we think, is clear that there were no railroad electricians and no one from the Railroad at all at the substation on the morning in question. See the testimony of James E. Johnson and Melvin Judge, who were in the substation performing whatever work was necessary to be performed (R 303-304, 308,309). The only reason appellees witnesses testified about a railroad electrician is because they said they saw Union Pacific trucks around the substation (R 122). That doesn't prove there were railroad electricians in the substation, for the trucks they saw might have been railroad trucks parked there for some other purpose, because the substation itself sets out in the open and does not preclude the parking of vehicles about it (R 123-124, 284).

Neither does the record support the statement that employees of the Pacific Fruit Express Company had been in the past assigned to work in the substation "for the purpose of painting lead wires" as stated on pages 5-6 of appellees Brief. The record only shows that that was what LaVerl Johnson was instructed to do on the day he received his injury (R 108).

Contrary to appellees statement of facts, there was a hot stick available to pull the disconnect switches (R 286).

Reference is made to the fact that there were no warning signs in the substation about pulling switches; but if that is of any importance, and we think it isn't, appellee LaVerl



Johnson testified that he paid no attention to any switches when he went in (R 228) ; so if he didn't look at the switches he wouldn't have seen any signs either.

Appellees endeavor to support their case by a statement that the appellant was furnishing electricity to the Pacific Fruit Express for a valuable consideration. There are some statements in the evidence about the furnishing of electricity to the Pacific Fruit Express Company, but nothing about a valuable consideration. There is nothing substantial to support any statement that appellant was furnishing electricity to the Pacific Fruit Express Company substation. All of the facts established that the electricity was being furnished by the Idaho Power Company jointly to the Pacific Fruit Express Company and the Railroad; they were merely co-users of energy coming from the same source.

The facts are clear and undisputed as shown in our Statement of Facts that the transmission line across the tracks to the substation, and the substation, are owned, operated and controlled by the Pacific Fruit Express Company. It is likewise clear and undisputed that when the energy left the Batiste line it was the property of the Pacific Fruit Express Company (R 341-342) ; the fact that the meter was on the 2300 volt side is not significant because the current can be metered on either side of the transformer (R 167). The Pacific Fruit Express Company agreed to pay the Railroad Company for the power it used from the Idaho Power Company plus 10% for transmission line and transformer losses (R 316).

That appellant was not furnishing or delivering energy

to the Pacific Fruit Express Company is established not only by the appellant's evidence, but also by the evidence of the appellees. First of all, the Pacific Fruit Express Company and the Oregon Short Line Railroad Company entered into a construction contract, Exhibit 26, which expired by its own terms April 28, 1929. The purpose of this contract was so that the Pacific Fruit Express Company could obtain power cheaper from the Idaho Power Company if the power it used was combined with that of the Oregon Short Line Railroad Company and the Railroad Company bill the Pacific Fruit Express Company for its portion of the power used (R 314-316). Appellees own evidence speaks louder as to this, for they put on as a witness Milton T. Sargent, Division Chief Clerk of the Idaho Power Company, and established that the Idaho Power Company furnished electricity to the Union Pacific Railroad Company, but found no billing from the Idaho Power Company to the Pacific Fruit Express Company (R 142-144). That would be natural under the co-user plan referred to, and to support this appellees introduced Exhibit No. 21 (R 210-211) in evidence, which is a bill rendered by the Union Pacific to the Pacific Fruit Express Company, and in part reads as follows:

"For your proportion for cost of Electric Current furnished at Pocatello, Idaho, in accordance with meter reading for the month: October 22 to November 22 incl. Such current being furnished by the Idaho Power Co. is being billed for in accordance with contract Audit No. 16598 dated June 10, 1930."

Also, Earl R. Gilbert, District Foreman for the Idaho

Power Company, who testified at the trial for both parties, was asked if he would have advised his Company not to furnish power to the substation in question, and he said:

“A. No, we would not advise them not to deliver energy because the service was always delivered to it, —at that time the substation had not been changed; it was safe at the time we started service and there was no reason why service should have been cut off” (R 238).

The Pacific Fruit Express Company was merely permitted to tap onto the railroad Batiste line (R 161) in order to obtain its power delivered by the Idaho Power. Exhibit 29, contrary to what appellees claim for it, merely enlarged the transformer site from 15x22 feet to 33x31 feet, and continue the rental for the right of the Pacific Fruit Express Company to maintain and operate the transmission line from the Batiste line across the tracks to the substation (R 336-338).

Also in support of the fact that the appellant was not delivering any energy to the Pacific Fruit Express Company it is to be observed that no claim is made, and, of course, none could be made, that the Railroad was generating any electricity. Before it could deliver any it seems to us it would have to generate it, and, of course, it was not doing that. The sum and substance is that the Idaho Power Company was delivering the energy and all the appellant did was to pay the total bill of the Railroad and Express Companies and charge the Express Company for what it used.

## ARGUMENT

(Appellees Brief—p 8 to 40)

From the facts stated and set forth in detail in our opening Brief it seems clear to us that appellees have not established by any evidence or by any substantial evidence that appellant was delivering electrical energy to the Pacific Fruit Express Company. There is no evidence that appellant was operating the substation.

The substation was owned, operated, and controlled by the Express Company; it held the premises under lease to the exclusion of appellant, for which reason appellant had no right, and we think no duty, to do anything about standards referred to in any of the Safety Codes. As a matter of fact, the Handbook we have H-32, which must be the same as the one appellees refer to, under Rule 91 B says:

“The intent of the rules will be realized (1) by applying the rules in full to all new installations, reconstructions, and extensions, \* \* \* .”

This Rule should apply in the present situation in favor of the Pacific Fruit Express Company if any of the rules are pertinent, for the substation was standard when built (R 236, 346) and was as safe on November 4, 1950 as the day it was built, with nothing defective about it. On the day of the accident, however, it was not operated safely by the Pacific Fruit Express Company (R 182-183, 203-205, 236-237, 344-345), and accordingly there was no reason to cut off service to the substation (R 238).

Appellees state it was the electrical energy which injured LaVerl Johnson. That cannot be denied, but that does not aid appellees for the reason that (1) appellant owed Johnson no duty; (2) the electrical energy going into the substation was only a condition and not the proximate cause, see pages 28, 36-44, 45-49 of appellant's opening Brief.

Appellees assert that appellant was required to exercise a high degree of care, but overlook the fact (1) that appellant was not delivering the energy, (2) that the energy belonged to the Express Company from the time it left the Batiste line to go across the tracks to the substation, both of which were owned and operated by the Express Company, (3) that the substation was not defective, was capable of receiving electrical energy, and was perfectly safe the day of the accident if it had been operated properly, but (4) the cause of the accident was the manner of operation by the Express Company.

Another thing which appellees fail to recognize is the fact that no one on the railroad (there is absolutely no proof) was advised or knew, or had any reason to know, that LaVerl Johnson, or anyone else, was to be sent into the substation on this particular day, or on any day, unaccompanied, without the most positive instructions what to do, or in the absence of positive instructions to see that the disconnect switches were pulled; none of which could be reasonably anticipated by the appellant even though it had a duty to anticipate, which we think it did not. LaVerl Johnson having been told to paint taped up leads to and from transformers, appellant could not reasonably anticipate he would pass up

the transformers and go to the rear of the substation and grab ahold of and attempt to paint a bare wire running to the lightning arrester.

No accident had ever occurred at this substation, which had been constructed for a period of about twenty-five years at the time this accident occurred. Nothing of the sort could have been reasonably expected to occur.

“Good seamanship does not require foreknowledge of unprecedented events.”

*The President Madison* (9 Cir.) 91 Fed. (2d) 835, 841.

See p 23-29 of our opening Brief, and the case of

*Charnock vs. Texas & P. R. Co.*, 194 U. S. 432, 48 L. Ed. 1057, where the court said:

“No loss from any cause is shown to have occurred during the existence of the practice,—nothing shown from which danger could be apprehended. One of plaintiff’s witnesses testified that tramps passed up and down the road daily; but what can be inferred from that? It is inappreciable. Was danger to be apprehended from their carelessness or malice? During the ten or eleven years of the existence of the station not an instance of either is shown.”

Accordingly the court held there was no negligence on the part of the defendant.

This case is applicable to the repetitious contentions made by appellees that unqualified persons were allowed in the

substation. We think there was no such evidence, except on the occasion when Johnson was injured or at times when the meter was read once a month, but the man reading the meter understood his business.

Appellees endeavor to make a great deal out of the testimony that the Express Company had no electricians. Why they refuse to recognize the facts or why they ignore the facts is beyond our comprehension.

Melvin Judge testified positively (R 306-313) that he was a qualified electrician with experience in high voltage; that he started to work for the Pacific Fruit Express Company in September, 1950, and in the morning of the day the accident occurred he went to this very substation to check and change transformer oil; that he went in with James Johnson, Howard Johnson, and some Express laborers; that the pole-top switch was pulled which killed the power in the substation except that which was going into the lightning arresters; that there were just the three of them in the substation except for the laborers, who left the station first. Judge knew there was energy in the lightning arresters and so did the Johnsons. To say that the Express Company had no electricians is in utter disregard of the record, and, of course, the trial court in making the statement he did (R. 351) overlooked Mr. Judge.

One reason perhaps why appellees do not care to refer to Mr. Judge is because of the statement which their witness McClellan (R 138) made,—that the man to whom he was introduced was a railroad electrician and looked more like a

farmer than an electrician. We have never thought that a man's looks determined his qualifications or ability, and, of course, the transcript doesn't disclose his features or his face, but he was a perfect picture for the man whom McClellan stated he was introduced to as a railroad electrician.

Appellees quote from Exhibit 26, on page 21 of their Brief, which is a correct quotation, but they overlook the fact that this was the construction contract between the Express Company and the Oregon Short Line Railroad Company and terminated by its own terms April 28, 1929 (R 319).

There is no claim here, and there is no evidence, that the appellant was generating and delivering electrical energy to the Express Company, and the evidence we think definitely establishes that appellant was not delivering the power to the Express Company which was being generated, furnished, and supplied to both the Express Company and appellant by the Idaho Power Company.

On page 23 of their Brief appellees state their theory of the case, all of which we know about, but, as we have shown by the facts, appellees theory is neither supported by facts or law.

Surely the appellant has a distribution system and some substations, but the Pacific Fruit Express Company substation with which this case is concerned, and the line across the tracks to the substation is no part of appellant's so-called system. They are independent of anything to which appellees refer.

Appellant's electricians knew about the substation, and like anyone else, including laymen, knew it was dangerous



if proper precautions were not taken by those in charge. All substations are dangerous, otherwise precautions would not be taken concerning them. They are fenced; this one is. The gate is locked and only two keys to it are available, both held by the Superintendent of the Express Company.

If appellees theory is correct, then no company generating electricity and delivering electricity could ever without liability furnish electrical energy to any substation. There is always something dangerous in a substation; if it had no lightning arresters in it at all there are many other wires and apparatus that are dangerous and hazardous; otherwise they would not be kept enclosed with a fence, and locked up. For this reason the law is that unless there are known "defects" in the equipment or the substation is for some reason incapable of receiving the energy, neither of which exists in the case at Bar, there is no liability on the part of one delivering electricity to equipment owned, operated, and controlled by others, see authorities, p. 29-35 of our opening Brief.

The testimony of Earl R. Gilbert, District Foreman of the Idaho Power Company, is not and cannot be disputed, that there were no defects in the station; it was capable of receiving safely the energy being supplied "as long as the gate was locked" (R. 237) "and it was safe at the time we (Idaho Power Company) started service, and there was no reason why service should have been cut off" (R. 238).

The trouble arose and the accident occurred because those in charge of the substation and supervising LaVerl Johnson, did not pull the disconnect switches to make the place safe

(R. 237, 239). Appellees own witnesses reluctantly admit this also (R. 182-183, 203).

The substation was dangerous to those working on the transformers the morning of the day the accident occurred, but it was made safe when the switch leading to the transformers was pulled.

Everyone in charge of the Pacific Fruit Express Company knew how to deenergize the substation, with the possible exception of Shupe, who wasn't even around at the time of the accident. James E. Johnson knew, H. O. Johnson knew, and most of all, the Express Company's own electrician, Judge, knew.

Appellees theory really is that appellant is an insurer, which isn't the law. Their position would be the same if someone had been injured around the transformers because they had not been deenergized, when, as a matter of fact, both the transformers and lightning arresters were so arranged as to be capable of being deenergized and those operating the Express Company and the substation knew how that could be done and had equipment to do it (R. 286, 304, 308, 310).

The only work appellant's electricians did for the Express Company was in 1948 and 1949, and some work as shown on Exhibit 33 (R 257, 259) which was paid for by the Express Company.

Appellees cases, commencing on page 15 of their Brief, set forth the rule of high degree of care under circumstances to which the cases relate. Their cases concern defendants

engaged in the business of generating and furnishing electricity and to situations where there was something decidedly wrong with or defective about, the defendant's own facilities. Such was the situation in the Chase case referred to on page 18 of their Brief.

The Chase case certainly has no application to the case at Bar, and we think it has about ceased to be of any use or importance so far as the question of negligence is concerned. The decision was by a bare majority of the court to start with, and the Supreme Court couldn't and didn't make it applicable in *Probart vs. Idaho Power Company*, 74 Ida. 119, 258 Pac. (2d) 361, except to cite it for another proposition of law; it was definitely disregarded as applicable to the question of negligence. That the case was before the court and disregarded is apparent by the dissenting opinion of Judge Thatcher.

Appellees cases show conditions of "defects", and when the phrase is used as "defective and hazardous" it means, we think, that it was a hazard because of a defect. *Bristol Gas & Electric Company vs. Deckard* (6 Cir.) 10 Fed. (2d) 66, cited on page 32 of their Brief, and greatly relied on by them, is an illustration. This and the other cases cited merely establish that where there are known defects electricity should not be furnished until the defects are corrected. No such a situation existed in the case at Bar.

As we have shown, the facilities were safe, adequate, and sufficient to receive the power being delivered, and the facility became unsafe not because of any defect but because of

the method of operation by the Express Company, but for which no injury would have occurred.

In *Nash vs. Pennsylvania R. Co.* (6 Cir.) 60 Fed. (2d) 26, the trial court directed a verdict for defendant, which was affirmed on appeal. The court said:

“\* \* \* In other words, a negligent failure properly to guard machinery or plant is not a defect or unsafe condition thereof. The latter phrase therefore evidently relates to some defect or unsafety inhering in the machine or the plant, as, e.g., some break, patent or latent, in the material, some loose board or hole on the floor. \* \* \*”

(Appellees Brief p. 40-45).

Section 54-1001 Idaho Code, quoted on page 40 of appellees Brief, states that installations “from and after the taking effect of this Act,” etc., shall be in substantial accord with the National Electric Code. “This Act” was first passed and approved in 1947, Chapter 251 of the 1947 Session Laws. The installations at the Express Company substation was in 1925.

As a matter of fact, there is no evidence in this case whether the substation was, or was not, in an incorporated city, so we cannot say whether the Code applies; but in any event there seems to be no contention that appellant should have done any or all of the things the Code might mention, or was required to do anything about the conditions mentioned by the witnesses Gilbert, Smith or Rising, which they determined after the accident occurred.

The remarkable thing about all of this is that neither the State Inspector Rising or Gilbert testified that they had ever told the Pacific Fruit Express Company to do anything about the substation, either before or after the accident. The witness Smith particularly made it apparent that he was thoroughly biased, and over objection was permitted to state and restate matters in an attempt to show hazards in construction; whereas Mr. Gilbert, a thoroughly qualified electrician, testified that the substation was standard when built; it came as a package job, either Westinghouse or General Electric, and at that time was the latest thing in substations; there was nothing defective about it; it was as capable of receiving energy now as when constructed; it was safe if it had been properly operated, and it was such that he, Mr. Gilbert, would not advise the Idaho Power Company to refuse to deliver service (R 236-238); and this testimony is undisputed.

How Section 61-302 Idaho Code has any connection with the appellant in this case is not clear. It might apply to the Express Company, and if so, it further establishes that the cause of the accident resulted from the acts, or omission to act, of the Express Company, and not otherwise. The same is true of anything relating to the National Electric Code.

Whether the pole-top switch should have also deenergized the lightning arresters is a theory no one thought of until after the accident occurred. There were switches to disconnect the arresters and they should have been pulled by the officers or agents of the Express Company, and everybody agrees, even the reluctant witnesses for the appellees, that if they had been

pulled the station would have been safe.

No one complains that it was hazardous to have transformers which could be deenergized by a switch, yet Smith and Rising say it was dangerous to have lightning arresters that could be deenergized by switches. Everything in the substation was dangerous unless everything was deenergized, or unless the station was properly operated. That is true of all substations.

The failure to have signs on switches to indicate whether they were open or closed had nothing whatever to do with Johnson's injury, because he never looked at any of the switches (R 228). Contrary to what appellees say, there was a hot stick available to pull the disconnect switches (R 286).

Appellees discussion herein misses the point for at least two reasons—(1) appellant was not delivering electrical energy to the substation; and (2) if it was, there was nothing wrong with doing so for there was nothing defective at the station and it was safe so long as it was properly operated (R 236-238).

This substation, we think, is comparable to an automobile or any other agency, dangerous or otherwise. If properly operated it is safe. If recovery can be had in this case then the manufacture or dealer of automobiles, or firearms, could be held liable on the theory that they had placed in the hands of people a dangerous instrumentality and should anticipate that someone would operate them or use them unsafely. Such a theory is so far-fetched that no one would consider it for a minute.

(Appellees Brief p. 45-52).

Appellees now contend it was appellant's duty to do something about the "perilous" conditions at the substation. From that it seems they are now insisting that instead of cutting off the power to the substation that the appellant should have rebuilt the substation, which, of course, is untenable.

Appellant's witness Taylor testified that Union Pacific electricians, if available, and with proper authority, would do work at the Pacific Fruit Express (R 353), but so far as this case was concerned no one was called.

We think the evidence supports only one conclusion about whether there were any railroad electricians in the substation the morning of November 4, 1950, and that is that there were none (R 303-304, 308-309). The man McClellan stated was to turn the power off was without any question Judge, the Pacific Fruit Express electrician (R 308). The only reason some of the witnesses said they saw Union Pacific electricians was because of the trucks parked in the vicinity of the substation, but what has all this got to do with the case, and how is the case affected by whether the Express Company men changed the transformer oil instead of an electrician? The Express Company's own electrician was inspecting and changing the oil on the day of the accident (R 309).

As we have shown many times, the evidence does not support a statement that appellant sold, furnished and distributed electrical energy to the Express Company, or that it maintained the installations and appliances through which

electricity was served to the Express Company substation, but under the facts and the law, what difference does that make? There was nothing defective about the station; it was serving its purpose as it had done for twenty-five years; it was safe but it was not operated safely by the owner and operator.

Appellant violated no statutes of the State of Idaho and violated no provisions of the Electrical Code. If there was any violation, and we think there wasn't, it was by the Pacific Fruit Express Company, the owner and operator of the station.

The Idaho cases commencing on page 47 of appellees Brief are cases concerning concurrent negligence. We have no negligence in this case and, of course, no concurrent negligence. Appellant owed no duty to Johnson, and appellees never proved that it did. *Chatterton vs. Pocatello Post*, 70 Ida. 480 223 Pac. (2d) 389, 20 ALR (2d) 783.

Appellant was not delivering energy in the first place, and if it was, there was nothing wrong in doing so; but in any event there was an independent intervening cause which interrupted the natural and normal sequence of events. This is not concurrent negligence. *Cole vs. German Sav. & L. Soc.*, 124 Fed. 113, 63 LRA 416. See pages 37-45 of our opening Brief; and contrary to what appellees say, a large majority of those cases are electrical energy cases.

Appellees have made only a slight effort to distinguish a few of appellant's cases; the Stearns case and the Chatterton case. They have not succeeded as to those cases; have



made no effort, and, of course, could not succeed if they had tried to distinguish the others. Particularly they pass over apparently very quickly, the most recent decision of the Idaho Supreme Court, *Splinter vs. City of Nampa*, 74 Ida. 1, 256 Pac. (2d) 215, and the one by this Court. *United States vs. Rothschild International Steve. Co.*, (9 Cir.) 183 Fed. (2d) 181. If this case should reach a point where the matter of proximate cause is to be considered these two cases alone are decisive.

In the case at Bar Johnson had a safe place to work if the premises were properly used. This situation was not caused by any breach of duty or negligence on the part of the appellant but was created entirely by the Pacific Fruit Express Company. *Austin vs. Riverside Portland Cement Co.* (Dist. Ct. App. Cal.) 271 Pac. (2d) 943, 948.

(Appellees Brief p. 53-56).

The verdict in this case is grossly excessive, and we think we fully demonstrated that in our opening Brief, p. 49-57.

Appellees appear to pass the matter off as if there is nothing to talk about, and perhaps the trial court thought so too, even though the trial court did say that it was a large verdict, but in any event, we think in the administration of justice the matter cannot and should not be so lightly considered.

If this verdict is not grossly excessive or monstrous then we think no verdict can ever be held to be so. Our analysis of what this amount of money means (p. 49-54 of our open-

ing Brief) condemns the verdict and requires that it be set aside. It certainly puts the appellee Johnson in a better financial position than if he had continued to work which we think this court condemned in the Guthrie case. That the man was severely injured and he suffered no one can or would deny, but we are dealing with rules of law and principals governing an award for compensatory damages.

If there is any case more pathetic or deserving of sympathy and pity than the facts presented in *Virginian R. Company vs. Armentrout* (4 Cir.) 166 Fed. (2d) 400, 4 A. LR. (2d) 1064, we haven't found it, yet this court in the Guthrie decision said that the Armentrout case was correctly decided, where a verdict for \$160,000.00 was set aside.

Also decisive is the case of *Neil vs. Idaho & W. N. RR*, 22 Ida. 74, 125 Pac. 331, quoted from on page 50 of our opening Brief. We think the rule there laid down is also binding on this court.

Contrary to what the trial court said in its Order, and in quoting from its previous decision in *Boice vs. Bradley*, 92 Fed. Supp. 750, as to securing the right to trial by jury in civil actions, this court in *Southern Pacific vs. Guthrie*, 186 Fed. (2d) 926, stated that—

“The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.” Note 10, page. 932.

The court was discussing the power to set aside verdicts.

We hardly think it is necessary to distinguish the cases set forth on page 55 of appellees Brief. However, we refer to the Ferguson case. It is not comparable and, as a matter of fact, a later case by the Eighth Circuit Court of Appeals is *Missouri K & T R. Co. of Texas vs. Ridgeway*, 191 Fed. (2d) 363, 368, where the court cited the Ferguson case, but held a verdict of \$98,800.00 to be "so excessive as to shock the conscience," and where the verdict was "for an amount fifty-five times his annual earnings for the year immediately prior to his accident." The verdict in the case at bar is sixty-two times Johnson's annual salary.

In the Kieffer case cited by appellees nothing was said by the Circuit Court of Appeals concerning the amount of the verdict.

In the Robinson case we think there is no comparison between Robinson's injuries and Johnson's. Robinson was completely wrecked, but it is difficult to follow the actions of the Florida Supreme Court in any event, for just prior to the decision in the Robinson case the court set aside a verdict for \$300,000.00, *Loftin vs. Wilson* (Fla.) 67 S. (2d) 185, which case also refers to the case of *Florida Power & Light Company vs. Watson*, 50 S. (2d) 543, wherein the court set aside an award of \$260,000.00 and ordered a new trial.

In the DeVito case the verdict was for \$300,000.00 and reduced to \$160,000.00; but in that case DeVito had 32 years life expectancy and was earning about three times as much as Johnson.

We think this court has rightly decided this matter in

favor of the appellant when in the Guthrie case it stated that the Armentrout case was correctly decided, and in *Baldwin vs. Warwick*, (9 Cir.) 213 Fed. (2d) 485, where this court held that an award of \$4,500 actual damages and \$50,000.00 punitive damages for conspiracy was so grossly excessive as to make unconditional denial of Motion for New Trial an abuse of discretion.

(Appellees Brief p. 56-58).

Error as to the testimony of Elmer V. Smith.—Appellees have misconstrued or missed the point of appellant's objection to the question asked the witness Smith. We know that so-called expert witnesses are generally permitted to make statements of fact concerning matters which are technical and which might aid the jury in deciding the matter before them, but we know of no law which permits an expert witness to decide by his own conclusions the whole case, or to tell the jury what the law is.

The witness had already expressed his opinion about certain features in the substation, but we objected to him telling the jury what the law was or what the *duty* would be one furnishing electricity under the conditions to which he had referred.

It clearly is not the province of an electrical expert, or any other expert, to state what the law is or to express a conclusion as to the whole case, which is the province of the court or the jury. See pages 57-59 of our opening Brief.

(Appellees Brief p. 59-66).

Appellees, prefacing their remarks regarding instructions,

state that no appeal can be taken from an Order denying a Motion for a New Trial.

The only possible fault that can be found with appellant's Notice of Appeal is that we probably put too much in it; that is to say, after appealing from the judgment entered November 25, 1953, and the amended judgment entered August 16, 1954, we also included the Order Denying Defendant's Motion for New Trial and its Motion for Judgment NOV. The appeal from the judgment carries with it a review of all matters incident to the judgment. *Libby, McNeill & Libby, vs. Malmskold* (9 Cir.) 115 Fed. (2d) 786.

Appellees assert that appellant waived the objections it made to the Court's instructions and its objections to those requested but not given by the court.

At the outset it should be stated that objections were made pursuant to Rule 51 of the Federal Rules of Civil Procedure (R 382-387), and we don't believe that *Boise Payette Lumber Company vs. Larson*, 214 Fed. (2d) 373, is decisive.

No where in the discussion of the instructions were there any remarks, nor was there a discussion, after objections were made to the Court's Instructions objected to and set forth as Assignments of Error IV, V and VI. There was certainly no waiver of the objections to those instructions. Also the same is true with reference to objections to Appellant's Requested Instructions 1, 6 and 8 (Assignments of Error VII, VIII and X, respectively).

After the jury was recalled and further instructions given (R 386), but which did not discuss any of the objections

previously made, except possibly Appellant's Requested Instruction No. 7 (Error IX), we stated to the court that we had no *further* objections which, of course, could not be considered a waiver of any objections up to that time. Then the question came up about not tying the Pacific Fruit Express Company into this (Requested Instruction No. 7), and the court said he told the jury that any action such as their pulling the switches, etc., the Union Pacific should not be held responsible for any of their acts. This had reference to our Requested Instruction No. 7 and to no other instruction, following which it was stated that "it" is all right and that we were satisfied; meaning, of course, Requested Instruction No. 7. We think nothing else can be made out of the discussion, and while it might be held that we waived our objection to Requested Instruction No. 7 we certainly waived no other objections.

Rule 51, of course, requires objections, and these were made; they were never withdrawn, even the ones made to Requested Instruction No. 7.

It is not our understanding that a narrow or technical view is taken of objections and after objections have once been taken we think it is unnecessary to insist upon a renewal of them; it was so held in *Moreau vs. Pennsylvania R. Company* (3d Cir.) 166 Fed. (2d) 543, where the court stated that counsel must point out to the trial judge his objections, "but he is not required to indulge in reiterative insistence in order to preserve his client's rights."

See also—*Stoltz vs. United States*, (9 Cir.) 99 Fed. (2d) 283, 284.

It is not always easy or practical to labor too extensively with the court regarding the instructions, and we think in this case that we were entitled to clear instructions and that our objections were sufficient to present the matter for review.

*Pierro vs. Carnegie-Illinois Steel Corp.*,  
(3 Cir.) 186 Fed. (2d) 75, 78;

*Williams vs. Powers*,  
(6 Cir.) 135 Fed. (2d) 153, 156;

*Sweeney vs. United Features Syndicate*,  
(2d Cir.) 129 Fed. (2d) 904, 906;

*Thomas vs. Union Railway Company*,  
(6 Cir.) 216 Fed. (2d) 18.

The court's instructions were general. We asked for specific instructions on our theory of the case. There was evidence to support the requests and they should have been given. *Chicago & N. W. Ry. Co. vs. Green*, (8 Cir.) 164 Fed. (2d) 55, 61.

## CONCLUSION

In closing this Brief we refer the court to our Conclusions in our opening Brief, but here we particularly summarize what we believe is vital and decisive of the case; that is to say, we sincerely believe there is no evidence of negligence on the part of the appellant. Appellant was neither delivering electrical energy to the Pacific Fruit Express Company sub-

station nor was it operating the substation. Delivery of energy to the substation, whoever was doing it, did not constitute negligence in any event. The substation was capable of receiving such power safely; there was nothing defective in or about it. It had operated satisfactorily and safely for twenty-five years, and was doing so on the date of the accident, and nothing had ever occurred to put anyone on notice that such an extraordinary set of circumstances might occur as brought about the injuries to Johnson.

The supplying of energy to the substation was only a condition in any event and not the proximate cause. The proximate cause was the failure of the Express Company to operate the station properly and as it had done for twenty-five years without incident; or the proximate cause was the failure of Johnson to do what he was told to do when he went into the substation.

There was no evidence, certainly no substantial evidence, to support appellees claim, and in any event the overwhelming evidence establishes that appellant's Motion for Directed Verdict or its Motion for Judgment NOV should have been granted. See—*State of Washington vs. United States* (9 Cir.) 214 Fed. (2d) 33, 40-41.

Respectfully submitted,

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L. H. Anderson

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E. C. Phoenix

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*Attorneys for Appellant*



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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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UNION PACIFIC RAILROAD COMPANY,  
a Corporation,

*Appellant,*

vs.

LaVERL JOHNSON and JOLEEN JOHNSON,  
husband and wife, and PACIFIC FRUIT EXPRESS  
COMPANY, a Corporation,

*Appellees.*

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**Petition for Rehearing and Brief**

---

TO HONORABLE ALBERT LEE STEPHENS,  
HONORABLE JAMES ALGER FEE, AND  
HONORABLE RICHARD H. CHAMBERS,  
CIRCUIT JUDGES OF THE ABOVE ENTITLED  
COURT

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FILED

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PAUL P. O'BRIEN



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**Petition for Rehearing and Brief**

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PETITION FOR REHEARING

LaVerl Johnson and Joleen Johnson, husband and wife, Appellees, respectfully petition this Honorable Court for a rehearing of the Appeal in the above entitled cause, and in support of this Petition, represent to the Court as follows:

We reserve our argued position as presented by the Appellees in the original hearing, but in this Petition address ourselves solely to features of the Decision wherein we believe the Court may be convinced its result is based upon the application of incorrect legal principles.

This Petition is devoted to convincing this Court that it has erred in its determination of three major questions upon

which it bases its opinion and has announced in its printed opinion.

### I.

The Court erred in holding at pages 3 and 4 of the printed Opinion that the electricity which injured the Appellee, LaVerl Johnson, was the electricity of the Pacific Fruit Express Company, and not the electricity of the Appellant, Union Pacific Railroad Company, and in ruling on such questions as a matter of law for the reason it disregards the evidence and the law and deprives Appellees of a jury trial, all as presented in the accompanying Brief.

### II.

The Court erred in holding at page 4 of its printed opinion that,

“We think to overcome the contract arrangement and establish joint control of the station someone of substantial authority with Union Pacific would have to be connected up with some joint control activity.”

for the reason that such a holding by the Court wholly overlooks the joint use made by the Union Pacific Railroad Company and Pacific Fruit of the sub-station at the point where Appellee, Johnson, was injured and for the reason that such a ruling disregards the evidence and the law, and deprives the



appellees of a jury trial, all as discussed in the accompanying Brief.

### III.

The Court erred in holding at pages 6 and 7 of the printed Opinion:

““We think there is no case that requires the vendor of electricity to require that his customer modernize his equipment to comply with improved safety developments when the equipment can be operated safely by the trained and safely by the untrained if properly cautioned”

for the reason such a ruling is not the law and disregards the evidence, all as discussed in the Brief.

### IV.

The Court erred in ruling as a matter of law on all of the points hereinabove set forth for the reason that there was substantial evidence in the trial of said case upon which a jury would be fully justified in determining that the electricity which injured LaVerl Johnson was the electricity of the Union Pacific Railroad Company; that the Union Pacific Railroad Company was jointly using the sub-station with the Pacific Fruit Express Company for the purpose of delivering electrical energy in the amount of 2300 volts to the Pacific Fruit Express Company; and that the duty of care did exist in the particular facts and circumstances of

this case, as more fully discussed in the accompanying Brief.

## V.

That the Court erred in its construction and interpretation of existing decisions in Idaho, in the 9th Circuit, and in other Circuits of the United States Courts respecting the duty of one handling and distributing electricity, all as more fully discussed in the Brief herewith submitted.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this Petition for rehearing be granted and that the justices before whom this matter was submitted and argued on the original hearing grant a rehearing and grant a hearing en banc before a full Court of all of the Judges of the United States Court of Appeals, and that the Judgment of the United States District Court for the District of Idaho, Eastern Division, be, upon further consideration by this Court, affirmed as to these Petitioners.

Respectfully submitted,

George R. Phillips

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Louis F. Racine, Jr.

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B. W. Davis

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## CERTIFICATE OF COUNSEL

I, Louis F. Racine, Jr., of counsel for the above named

Petitioner, do hereby certify that the foregoing Petition for Rehearing of this cause is well founded and presented in good faith, and is not interposed for delay.

Louis F. Racine, Jr.

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*of Counsel for Appellees*

## BRIEF IN SUPPORT OF PETITION FOR REHEARING

In the presentation of this matter, we do not mean in any manner to be disrespectful. We believe ourselves to be sincere and correct in our position, and will try to be positive and emphatic in urging upon the Court the errors which we believe have been committed. The opinion of this Court discloses a tremendous intellectual difference of opinion between the Court and Counsel and we believe the Court has unjustly and unfairly taken from the Johnson's that to which they are entitled by a jury verdict following a proper trial and places property rights above human rights and personal rights.

The Brief will be presented under the individual grounds and numbered headings as set forth in the Petition.

### I.

The Court has, by its Opinion at pages 3 and 4, determined that the Union Pacific Railroad Company had no control and dominion of the electricity and did not own the electricity which injured LaVerl Johnson, on the basis

that where the incoming electric wires went into the sub-station enclosure control and dominion passed from the Union Pacific Railroad Company to the Pacific Fruit Express Company. We believe that the evidence and the record and the law cannot fairly support a conclusion as made by the Court.

The Agreement, introduced in evidence by the Appellant as Exhibit 26, (Tr. pp. 314-320) provides (Tr. p. 315) that maintenance, repairs, renewals and changes in construction of the transformer station for the delivery of power at approximately 2300 volts shall be made by the Railroad Company at the cost and expense of the Pacific Company. The Agreement, likewise, (Tr. p. 316) provides that the Railroad Company will install and maintain at the expense of the Pacific Company, meters to measure the electric service, and will inspect such meters from time to time. The remaining portion of that Agreement provides as to the method of payment by the Pacific Company to the Railroad Company, the testing of meters, the correction of faulty meters, the definition of the error of a meter, the method of billing the Pacific Company for the power consumed by it. The record shows, without dispute, that the voltage running over the Union Pacific lines was in the amount of 12,500 volts, and that such a voltage ran into the sub-station (Tr. p. 281). The electricity which the Pacific Fruit Express undertook to receive from the Railroad Company, and for which the Railroad Company billed the Pacific Company was 2300 volts, not 12,500 volts (Ex. 26, Tr. p. 315). Johnson was injured by the 12,500 volts of electricity which ran over all

of the high-voltage lines of the Union Pacific Railroad Company of Pocatello, Idaho, and was not injured at a point on the Pacific Company side of the meter by the 2300 volts of electricity for which the Pacific Company was billed, and paid (Tr. pp. 162-163). An examination of the entire record shows no shred of evidence to the contrary. By deciding as a matter of law that the presumption is that the electricity injuring Johnson was that of the Pacific Fruit, the Court has decided the facts and supplanted its judgment for that of a jury, and disregarded the law.

The Court cites no cases but *Ohio Power Company vs. Beck*, Ohio, 199 NE 860, page 861 of the *Northeastern Reporter*, seems to us directly in point. There, the Court said:

“It is clear that the electric energy furnished was the property of the power company until it reached the meter beyond the tipple. There were mutual advantages to both contracting parties. By measuring this current within the plant, and closer to its point of consumption, the brick company was advantaged, in that the power company would bear the loss of current lost by groundage from the property line to the meter. On the other hand, the power company, without expense for line erection or maintenance within the brick company plant, had permissive use for transmission of its property.

“To say that a power company has no control over an appliance of another, which it in fact exclusively used for the conveyance of its own property, the commodity in this instance being a deadly agency, is to conclude that one may be excused from responsibility because another actually owns the property which it uses. It is certain that, when a bailee, gratui-

tous or otherwise, makes use of property potentially dangerous, or makes it so by the manner of his use, and thereby injures another, where the other has a legal right to be, he cannot be heard to say that he is not liable because another actually owns the property. We see no distinction in principle between the presented situation and suggested comparison.

“The power company had at least possessive control of this line up to the meter. If it turned a dangerous agency thereon, knowing of defects therein, or there were defects that it might have discovered upon reasonable examination, it is just as negligent because of the dangerous defect therein as if it actually owned the appliance. One is not entitled to notice of that which he is bound to know; but if notice was necessary, then we must conclude that the record contains sufficient facts thereof to sustain the jury’s verdict. The power company had, by virtue of its permissive and exclusive use of this line, a corresponding duty to perform, that is, to see to it that its commodity could be safely conducted over the property without injury to the employees of the brick company, who had a legal right to be in and about this line.”

It must be noted that the case above cited and quoted was one, as is this case, where the transmission of a deadly agency was made into and upon another’s property to a point where it had to be and was measured, stepped down, and made available for the consumer’s use. The Court in the above case made mention of the fact that the service contract between the power company and the brick company provided for a delivery of a certain voltage at the meter which meter was installed by the power company on the brick company property, and that the power company would have free ac-

cess to the premises for the purpose of examining, repairing, or removing meters or other appliances belonging to the power company. Exactly the same situation exists between the Railroad Company and the Pacific Company in the instant case.

The Ohio Court is not alone in its view of the matter of joint use of electrical facilities fixing a joint responsibility. The California Court in *Irelan-Yuba Gold Quartz Mining Co. vs. Pacific Gas and Electric Co.*, 116 Pac. 2d 611, held that a distributor of electrical energy, using the customer's lines and apparatus to deliver energy to the customer, is not relieved of responsibility of maintenance and use of ordinary and reasonable care, according to the danger of handling electricity, since the line and apparatus in such an instance is at least under joint control and joint use of the company and the customer. *Moseley vs. Garden City Irr. Power Co.*, Kan. 152 Pac. 2d, 799, and *Texas Electric Service Co. vs. Anderson*, Tex. 55 SW 2d 142, are illuminating cases on this matter of joint control and joint use. Despite these cases, and the rules announced by the cases, particularly the Ohio case, which rule would seem to be nothing more than good common sense, the Court has concluded that at the point where the wires went into the sub-station enclosure the Railroad Company no longer had dominion or control or any responsibility regarding the facilities carrying its 12,500 volts of electricity. Why there was any difference between that point and some other point up to the point where the electricity was metered and thereafter was distributed and used by the Pacific Company in its own facilities is not explained.

The Railroad Company and the Pacific Company under this reasoning might just as well have tied a rag on the line and agreed that point was the delivery point and beyond that point—even though the same amount of electricity was in the line, not yet metered, the Railroad responsibility ended. The Pacific Company could not and did not use the 12,500 volts of the Railroad's electricity, and did not have dominion over that electricity. The Pacific Company was interested in the electricity on its side of the transformer and the meter, and that fact is abundantly shown in that the Pacific Company did not pull the disconnects which would cut off the Railroad's 12,500 volts of electricity running into the lightning arresters which so horribly injured Johnson. The Pacific Company apparently didn't even have hot-sticks in the sub-station; again showing that it did not consider it had control or dominion over the disconnects because to operate those disconnects hot sticks are required to cut off the 12,500 volts running into the lightning arresters. The Pacific Company's concern was with the electricity which they could use and which they were paying for, and that was the 2300 volts and not the 12,500 volts which the Railroad Company ran over its lines to the points of transformers and meters where that amount was stepped down to the lower voltage for use by the Pacific Company.

## II.

At page 4 of the printed Opinion of the Court, the Court concludes that the contract arrangement is such that the Pacific Fruit was obligated to maintain the station, although



it, from time to time, hired Union Pacific to do so, and occasionally someone else, and that as a consequence the contract arrangement controls and does not establish a joint control of the substation. Such a finding as a matter of law is an erroneous and unsound conclusion on the part of the Court and a positive invasion of the function of the jury. The exhibits, particularly Exhibit 26, clearly set forth that the Railroad shall "maintain, repair, make all renewals and changes in said construction, but at the cost and expense of the Pacific Company." In addition, that exhibit and the record show that the Railroad Company and the Pacific Company were jointly using the appliances, namely the lines and the sub-station, up to the point of the transformer and the meter, for the reason that the Railroad Company could not and did not charge for more than 2300 volts of electricity. The Pacific Company could not use more than 2300 volts of electricity, and could not receive and use the 12,500 volts of electricity going over the Railroad system, and into the sub-station to the transformers and meter. Exhibit 26 clearly recognizes the responsibility of the Railroad Company as a supplier of electricity where, in that Agreement the right is reserved to make the maintenance and repairs at the cost and expense of the Pacific Company. The record is replete with evidence which wholly justified the jury in finding a joint use; and time and again the Railroad Company was at the sub-station making repairs and doing maintenance work. Further, the Pacific Company did not have electricians on its payroll. The evidence justified the jury in determining that Union Pacific men were in the sub-station, working on

the very day in question (Tr. 134, 136). The evidence also justified the jury in determining that the Railroad Company would come at any time of the day or night to the Pacific Company sub-station to do any necessary work. The electrical foreman of the Union Pacific Railroad Company so testified. (Tr. 355).

The distributor of electrical energy has the duty of exercising the highest degree of care. Such a rule applies, not only in Idaho, but in most jurisdictions; and, the Idaho Court has seen fit to very positively announce such a rule in numerous Idaho cases, all as cited in our original Brief. The Ninth Circuit Court of Appeals, has, likewise, very definitely recognized such a rule. These cases, are cited in our original Brief, under heading "A", commencing at page 9, and continuing to page 40 of the argument. The Court has cited no decisions of its own, of the Idaho Court, or of any other jurisdiction in determining as a matter of law that the electricity was that of the Pacific Company, and in determining that there was no joint use of the facilities to the point where Johnson was injured. The Court simply by-passes the Idaho decisions, and the decision of the Ohio Court, the California Court and others, as above cited and quoted, by saying that the Union Pacific did not own the current or the appliances. In so doing, the Court violates the rule as laid down by the Supreme Court of the United States in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64. The Court, we believe, is not in as good a position to say what the Idaho law is and what the Idaho Court would hold, as the Trial Judge, with a lifetime of experience as a trial lawyer in Idaho.

The Court makes no reference to Exhibits 22, 23, 24 and 25, having to do with the National Electrical Code as adopted in Idaho, and the Idaho Minimum General Safety Standard Practices. In so doing the Court, again, fails to take cognizance of existing Idaho Law, rules and regulations.

Under the theory of ownership of the electricity and joint use, aside from any duties of care as referred to by the Court elsewhere in its Opinion, the jury had a right under the evidence to determine that the Railroad Company had not complied with the law in Idaho, the National Electric Code, the Idaho Minimum General Safety Standard Practices, and as a consequence was guilty of negligence which was a proximate cause of injury to Johnson. The adverse determination by this Court of the ownership of the electricity and the joint use substantially defeated the rights of Appellants. And was accomplished without reference to a single authority or precedent.

### III.

After adversely determining the ownership of the electricity which injured Johnson, and the question of the use of the Pacific Company's line and facilities to carry the Railroad's 12,500 volts of electricity into the sub-station, where it could be transformed and metered for the use of the Pacific Fruit Company, the Court, at pages 6 and 7 of its opinion, was required to determine the duty of a distributor of electricity as to conditions existing in a customer's appliances. A determination of that duty was not at all necessary if there had been a proper determination of the matters discussed

under heading I and II of this Brief.

The decision cited by the Court, *Kelly vs. Duke Power Co.*, (4 Cir.) 97 F. 2d 529, cited at page 6 of the Opinion, in support of the Court's statement and ruling that there was no duty to Johnson, did not involve a question of notice and knowledge and the rule as to notice and knowledge was not even mentioned in the opinion. Thus, it is not authority for the statement, "Beyond that, we do not think the cases go." *Bristol Gas and Electric Co. vs. Deckard*, (6 Cir.) 10 F. 2d 66, is cited in support of the statement by the Court, page 6 of the Opinion, "that the duty exists when a known hazard arises from the owner's failure to maintain or repair or restore equipment to its original condition." The Bristol case was not one of restoring equipment to its original condition, but was one where the roof leaked, and the power company knew about it, although the electrical equipment, and the roof, and the line carrying the electricity to the customer's equipment were all owned and controlled by the customer; and the Court held that the power company had an obligation to require the brick company, the customer, to repair the leaky roof, or turn off the electricity, for the reason that the rain dropping on the electrical equipment would short the equipment and create a dangerous and hazardous condition. The roof was not a part of the electrical equipment.

The Court makes reference and analogy to a band saw and to an old-fashioned electric heater. Those analogies are hardly comparable to a high-voltage electric sub-station carrying 12,500 volts of deadly electricity. Nor is a home band-

saw or a home electric heater comparable to a sizable industry, such as the Railroad Company and the Pacific Fruit Company, handling large voltages of electricity for industrial, and not home use. Appellants Exhibit 28, Tr. pp 326-333, at page 330, recognizes that the Railroad Company and the Pacific Company in the use of the premises upon which the sub-station was located, but owned by the Railroad Company, had a duty to conform to laws, ordinances and other public regulations in effect, or to later be enacted. The National Electrical Code, and the Idaho Minimum General Safety Standard Practices refer to electrical sub-stations, and provide for safe industrial practices in the use and handling of electrical energy of high voltage. Surely, the Court must recognize a duty in such circumstances.

The Court rules there was no duty. The Court states there was no duty unless the distributor turns electricity into improperly installed electric wires, known to contain a possibility of fire if energized. The Court states perhaps there was a duty on the part of a distributor of electric energy where the customer fails to maintain or repair or restore equipment to its original condition. The Court, then holds that where, as in this case, the distributor handles over its own lines, high-voltage electricity, 12,500 volts to be exact, and sends that precise amount of voltage from its lines into lines and appliances owned by a customer, that the distributor's duty as to any common sense safety practices ends when the electricity leaves lines owned by the distributor. This ruling, the Court would say, applies even though the customer cannot and does not use the 12,500 volts. It applies

even though the distributor meters the electrical energy in on the customer's premises, and even though the electrical energy metered is stepped down from the distributor's 12,500 volts to 2300 volts which is the voltage that the customer can use. This ruling applies even though the customer is charged for 2300 volts, not 12,500 volts.

What happens to the experience of society as to safety practices over a period of years after the original installation of the electric appliances on the customer's premises? That, apparently, is of no concern to the Court. So long as the distributor does nothing more than require that a customer maintain and keep in repair his appliances as they were originally, and only for the purpose of conducting the electricity without the electricity escaping, the distributor has conformed to the Court's ruling. What happens to the well recognized rule in Idaho that one having such a destructive and mysterious force as electricity under and within their control must use "the highest degree of care known to man" is not announced by the Court. That such a duty does exist in Idaho, is apparent from the Idaho cases cited in the original Brief, announcing that such a duty is placed upon anyone handling and controlling and distributing electrical energy. This Court would say that notice to and knowledge of a distributor of electrical energy relative to dangerous and hazardous conditions involving the distribution of electrical energy existing on a customer's premises applies only in the restricted instances discussed above. The Court would restrict the duty to whether or not the appliance can safely receive the product and refuses to discuss or recognize safety

procedures laid down in the National Electrical Code, representing the experience of the electrical industry, and setting standards of care recognized as required to conform to safe practice in the industry, and designed to prevent the uninitiated from being injured. It is no answer to suggest that the "untrained" could safely handle high-voltage electricity "if properly cautioned" because of the very freakish nature of electricity. Well trained electricians cannot always predict what electricity will do. An intelligent electrician would not caution the "untrained" as to how to handle high-voltage electricity but would stay with such an "untrained person." This is recognized in the National Electrical Code and untrained persons in high-voltage electricity are not to go into a sub-station carrying high voltage without trained high-voltage electricians. The Railroad in this case had notice and knowledge that untrained persons were going into the sub-station and the jury had a right to determine on the basis of such evidence that the Railroad Company had been negligent in not requiring safe-guards in the sub-station under such circumstances. Particularly is this true because the unguarded lightning arresters, carrying the 12,500 volts of electricity of the Railroad Company were, in fact, used by the Railroad Company to drain and ground extra surges of electricity owned and distributed by it.

The Court recognizes in its Opinion that the Railroad Company, as a distributor, might well have foreseen that such an injury might occur. But the Court simply states that regardless of such a fact, and although the Railroad might have foreseen such an injury might occur and although the

Railroad Company was a distributor of electric energy, that it was under no obligation to do anything to prevent injury or death in the situation here, and under no obligation to itself conform to recognized standards of safety or to require the customer to conform to such standards.

Such a holding is not the law. The Court makes no reference to, nor attempts to discuss in any manner, the cases which have arisen between a distributor and a customer involving the right and the duty of a distributor to require customers to install new safety devices. Generally, those cases arise, not by reason of injury or death of persons or damage to property, but out of proceedings instituted by a customer to require the power company to turn the energy back into the customer's premises, and/or for damages arising from the shutting off of the energy. In *Alabama Power Co. vs. Henson*, Ala. 191 So. 379, the Court held that it is a right and may become a duty of an electric utility to require customers to install new devices. In *Wiegand vs. Alabama Power Co.*, Ala. 127 So. 206, at page 209, the Court said:

“\* \* \* (It is the power company's) duty and right to adopt improved methods of instrumentalities intended for better protection, not only of property, but of human life as well. \* \* \*”

In *Arkansas Power and Light Co. v. Abboud*, Ark. 164 SW 2d, 1000, the power company was held responsible for damages for breach of contract to a customer who relied on a supply of electricity where the power failed because of faulty conditions on another customer's premises. The Court



there reasoned that the power company had a duty of inspection as to the facilities on the other customer's premises in order that proper service could be assured to all other customers.

Many cases recognize that as the danger increases, the degree of care required is greater. Such cases are cited in the original Brief. However, in *Martin vs. Northern States Power Co.*, Minn. 72 NW 2d 867, the Court discussed the duty of care where electric wires carry strong and dangerous currents, and where the result of negligence may be an exposure to serious accident and damage; and there recognized that a very high degree of care is required. Certainly, far more than is necessary in so far as the use of a band saw or a small home heater.

#### IV.

This heading of the Petition has been discussed under the immediately preceding three points.

#### V.

We firmly believe that this Court has, by its decision, taken from Johnson a right to trial by jury. The Trial Court instructed, and the jury decided, on substantial evidence the very issues which this Court now rules upon as a matter of law. The Court rules upon such issues without the benefit of any citation or authority. The rule in Idaho, and the rule which, as we understand, also applies in the Federal

Court, possibly to even a greater degree, is that a Court has no right to take questions from the jury if there is any evidence upon which reasonable minds might differ as to the conclusions and inferences arising from such evidence.

The Supreme Court on April 9, 1956, in case number 282, *Schulz vs. Pennsylvania Railroad Co.*, 100 L. ed. p. 430, an action under the Jones Act, said:

“\* \* \* The Seventh Amendment to the Constitution provides that ‘the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law.’ We granted certiorari to consider the failure of the district court to let this case go to the jury, 350 U. S. 882”. \* \* \*

“In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. ‘We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as

others.' *Jones v. East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445 (1888). \* \* \*

"\* \* \* But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

In *Dunclick, Inc. vs. Utah-Idaho Concrete Pipe Co., et al*, March 28, 1956, \_\_\_\_\_ *Ida.* \_\_\_\_\_, 295 P. 2d 700, the Idaho Court said once again:

"“This Court has frequently and uniformly held that findings made by the trier of facts, supported by substantial, competent, although conflicting evidence, will not be disturbed on appeal. *I. C.*, Sec. 13-219; *Lanning v. Sprague*, 71 *Ida.* 138, 227 P. 2d 347; *Williams v. Idaho Potato Starch Co.*, 73 *Ida.* 13, 245 P. 2d 1045; *Summers v. Martin*, 77 *Ida.* \_\_\_\_\_, p. 2d \_\_\_\_\_.”

There have been many announcements as to the inviolability of our system of juries as fact finding bodies. Mr. Justice Storey, former Justice of the United States Su-

preme Court, a learned jurist, in his book "Storey on Constitution", page 1779, expressed himself as follows:

"\* \* \* the Constitution would have been justly obnoxious if it had not confirmed it (right to trial by jury) in the most solemn terms."

Associate Justice Sutherland of the Supreme Court of the United States, in *Dimick vs. Schmidt*, 293 U. S. 474, 485, said:

"Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment should be scrutinized with the utmost care".

## CONCLUSION

The Court has considered this case to be a "hard case" and one which "brings us no pleasure or happiness". Having so stated we entrust to the Court the task of once again carefully considering the evidence in this case and the decisions cited by the Johnsons in their original Brief, as well as the decisions cited in this Petition and Brief on Rehearing; and we most respectfully and sincerely believe that the Court upon a re-examination of its decision will withdraw its previous opinion and affirm the judgment of the Trial Court.

Respectfully submitted,

George R. Phillips

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Louis F. Racine, Jr.

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B. W. Davis

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*Attorneys for Petitioners.*

No. 14500

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**United States  
Court of Appeals  
for the Ninth Circuit**

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In the Matter of:

The Application of L. B. & W. 4217; and the Application of JONES, WILSON and ERVIN, d/b/a "THE CLUB" for Beverage Dispensary License, C. K. JONES, RICHARD L. WILSON, and E. WELLS ERVIN,

Appellants.

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**Transcript of Record**

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**Appeal from the District Court  
for the District of Alaska,  
Third Division**

**FILED**

DEC 20 1954

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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-26-54

PAUL P. O'BRIEN,  
CLERK



No. 14500

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**United States**  
**Court of Appeals**  
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ATTORNEYS FOR APPLICANTS

MR. E. L. ARNELL,

Attorney at Law,

202 Turnagain Arms,  
Anchorage, Alaska.



APPLICATION FOR LIQUOR LICENSE IN  
THE TERRITORY OF ALASKA

## Third Division

License No. .... Application No. ....

1. I/we, C. K. Jones, Richard L. Wilson, & E. Wells Ervin, the undersigned, doing business as The Club, hereby apply for a Beverage disp. liquor license for the year ending December 31, 1954, and tender herewith the sum of \$500.00 plus a filing fee of \$18.00.

2. Name and address and how long a resident of Territory of Alaska?

C. K. Jones, Kenai, Alaska—15 yrs.

Richard L. Wilson, Kenai, Alaska—6 yrs.

E. Wells Ervin, Anchorage, Alaska—37 yrs.

3. Is this a first application, or for a renewal?

Renewal.

## Type of License

## Beverage Dispensary

(Population less than 1500).....\$ 500.00

(Population over 1500)..... 1,000.00

(Minimum residence 1 year)

Restaurant ..... 150.00

Road House ..... 75.00

(Situated not less than 18 miles from  
incorporated city)

Club .....	200.00
(Incorporated at least 2 years)	
Retail Stock Sale.....	100.00
Bottling Works .....	100.00
Brewery .....	100.00
Retail .....	300.00
(Minimum residence 1 year)	
Distillery .....	100.00
Importers .....	500.00
Common Carrier	
Boats (For boats over 250 tons U. S.	
Customs House measurement only).	
	250.00
Railroad Buffet Car.....	250.00

5. Location of business to be conducted under license applied for:

Kenai, Alaska.

6. Distance by any public thoroughfare, street or alley, from any school ground or church?

Over 200 ft.

If within 200 feet, and not a renewal, attach plat showing exact location.

7. Have you any other kind of liquor license? If so, state its kind and where used:

Inlet Bar & Inlet Liquor Store.

8. Endorsements as to character and integrity of applicant, and desirability of issuing license applied for. (Five Endorsers Must Sign Personally Below)

.....  
.....

Name, Address, Occupation, Residence in Territory.

9. Are you a citizen of the United States? If so, born or naturalized?

Born.

10. If a corporation, are you qualified to do business in the Territory?

11. For Use Outside of Incorporated Towns: I have attached hereto a complete written list, alphabetically arranged, of all citizens of the United States over the age of 21 years residing within a radius of one mile of the place for which the license is desired, stating the actual place of residence of each, by street and number where possible, and the length of such residence thereat, verified by oath by the person taking the actual census and that said census was taken within six weeks prior to the date of this application. I have also attached hereto a petition containing the names of a two-thirds majority of all citizens over the age of 21 years residing within one mile (radius) of the place where liquor is to be sold, bartered, manufactured, etc.

12. Applicant Declares: If application is for Retail or Dispensary license, if an individual or as-

sociation, that he has resided in Alaska for at least one year prior to the date of this application;

If a corporation, that it is qualified to do business in Alaska;

If application is for a Beverage Dispensary or Retail Liquor license, that no corporation, wholesaler, owner, officer or representative of any brewery, winery, bottling works or distillery owns any interest in such business or has financed directly or indirectly the applicant in procuring quarters or supplying equipment or furnishings in order to conduct such business;

That no person or persons other than the applicant has any direct or indirect financial interest in the business for which this license is sought; that he or she will superintend in person, the management of the business and if any other person is employed to manage the same, that he or she will have the qualifications of an applicant and that applicant will be responsible for the proper conduct of the business;

That the building in which liquor is to be sold is 200 feet or more from any school ground or church, or, if the license is a renewal that it is for a building in which the sale of intoxicating liquor was authorized by law on March 23, 1949;

If a retail Liquor license is applied for, that the premises are not connected by doors or otherwise with premises upon which any other business is conducted;

If application is for a Club license, that applicant has been incorporated under Territorial or National charter for two years or more.

/s/ E. WELLS ERVIN,

/s/ C. K. JONES,

/s/ RICHARD L. WILSON,

Name of Persons or  
Corporation;

.....,  
Signature of Officer of  
Corporation and Title;

.....,  
Principal Office of  
Corporation.

United States of America,  
Territory of Alaska—ss.

C. K. Jones, Richard L. Wilson & E. Wells Ervin,  
being first duly sworn on oath, depose and say:  
They have read the foregoing application on the face  
and back hereof and the same is true in all respects.

/s/ C. K. JONES,

/s/ RICHARD L. WILSON,

/s/ E. WELLS ERVIN,  
Signature.

Subscribed and sworn to before me this 8th day of December, 1953.

[Seal]      /s/ IRENE WELCH,

Notary Public. Comm. Exp. 11/1/54.

Title of Officer Administering  
Oath.

Must Be Completed and Signed by Applicants  
Outside of Incorporated Towns Only

Kenai, Alaska.

December 8, 1953.

I, C. K. Jones, Richard L. Wilson & E. Wells Ervin, the applicants on the foregoing application for a Beverage Disp. liquor license, do hereby certify that the number of citizens over the age of twenty-one years that reside within a one-mile radius of my place of business are 255 in number; that the number of bona fide and qualified citizens that have signed the petition that accompanies my application are 178.

/s/ E. WELLS, ERVIN,

/s/ C. K. JONES,

/s/ RICARD L. WILSON,

Applicants.

Note: Section 12. Penalties. A violation of any of the provisions of this Act shall be deemed a misdemeanor, and upon conviction thereof shall be punished by imprisonment of not more than one year, or by a fine of not more than Five Hundred



Dollars (\$500), each violation to be considered a separate offense. Any intoxicating liquors shipped into the Territory, other than to licensees hereunder and contrary to the provisions of this Act, shall be deemed contraband, and subject to confiscation by the Territory, or any enforcement officer, and any intoxicating liquors so seized shall be sold under the order of the District Court, and the proceeds thereof deposited with the Territorial Treasurer.

That any false material statement made in any part of this application shall be deemed perjury and upon conviction thereof shall be subject to the penalty provided by law for the crime of perjury.

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Bond No. 193345.

Territory of Alaska

Bond for Beverage Dispensary License

Know All Men by These Presents, That we, Richard L. Wilson, C. K. Jones, and E. Wells Ervin, d/b/a The Club, of Kenai, Alaska, as Principals, and the American Casualty Company of Reading, Pennsylvania, organized under the laws of the State of Pennsylvania and duly qualified to transact surety business in the Territory of Alaska, as Surety, are held and firmly bound unto the Territory of Alaska, in the full and penal sum of Twenty-five Hundred Dollars (\$2,500) lawful money of the United States for payment of which, well and truly to be made, we and each of us, bind ourselves, our

heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 3d day of December, 1953,

The Conditions of the Above Obligation are such, That whereas the above bounden Principals have filed in the District Court for the Territory of Alaska, an application for a license to engage or continue to engage in the business of Beverage Dispensary in accordance with the provisions of Chapter 78 of the 1937 Session Laws of the Territory of Alaska as amended by said Session Laws of 1939 and desire to give bond as required by said law, for the term beginning January 1, 1954, and ending December 31, 1954, and the Principals are the sole owner and no other persons are financially interested either directly or indirectly in the business to be covered by said license.

Now, Therefore, if the said Richard L. Wilson, C. K. Jones & E. Wells Ervin, the above-bounden Principals, shall, if said license is issued to them, conduct said business in accordance with the existing laws pertaining to the manufacture and sale of intoxicating liquor in Alaska, then this bond shall be void and of no effect; otherwise, to remain in full force and virtue.

In Witness Whereof, the Principals have hereunto set their hands and seal, and the said Surety has caused these presents to be signed by its duly authorized Attorney-in-fact and its corporate seal

to be hereto affixed the day and year first above written.

THE CLUB,  
Principal.

/s/ E. WELLS ERVIN,

/s/ RICHARD L. WILSON,

/s/ C. K. JONES,

AMERICAN CASUALTY COMPANY OF  
READING, PENNSYLVANIA,

[Seal] By /s/ R. H. McDONALD,  
Attorney-in-Fact.

April 1, 1954.

Affidavit

I, C. K. Jones, first being duly sworn, say: That the following is a full and complete census of all citizens over the age of 21 years, residing within a one-mile radius of The Club during the preceding six months; and that it was taken within the last two weeks.

[Seal] /s/ C. K. JONES.

Subscribed and Sworn to before me this 12th day of April, 1954.

[Seal] /s/ BETTIE K. JACOBS,  
Notary Public in and for  
Alaska.

My commission expires: 5/19/54.

[Here follow list of 252 names.]

\* \* \*

[Endorsed]: Filed April 13, 1954.

In the District Court for the Territory of  
Alaska, Third Division

In the Matter of the Application of:

L. C. PARNELL, Doing Business as THE CLUB,  
for a Beverage Dispensary Liquor License.

### CONSENT OF RESIDENTS

We, the undersigned, citizens of the United States and bona fide residents of the Territory of Alaska, over the age of twenty-one years, residing within the one (1) mile area of The Club, Lot 16, Block 5, Townsite of Kenai, and having been physically present, living, and residing within the one-mile area for more than six out of the twelve months immediately preceding the filing of this Petition, and in good faith, consent to, and ask that a Beverage Dispensary Liquor License be issued to L. C. Parnell, doing business as The Club, for such sale of intoxicating liquor in the voting and recording precinct in which the aforesaid described premises are located for the year ending December 31, 1954.

[Here follows list of 178 names.]

\* \* \*

[Endorsed]: Filed April 13, 1954.

CERTIFICATE OF APPLICANTS

We, C. K. Jones, Richard L. Wilson & E. Wells Ervin, applicants for the attached liquor application, do hereby certify that the building in which liquor is to be sold is 800 feet by the shortest direct line from a school ground or church.

/s/ E. WELLS ERVIN,

/s/ C. K. JONES,

/s/ RICHARD L. WILSON,  
Applicants.

[Check]

59-6

The First National Bank  
of Anchorage

No. ....

Mt. McKinley

Anchorage, Alaska, Dec. 8, 1953.

Pay to the

Order of Clerk of Court.....\$518.00

Five Hundred Eighteen and no/100 Dollars.

/s/ E. WELLS ERVIN.

United States of America,  
Territory of Alaska—ss.

### AFFIDAVIT

Richard L. Wilson, of Kenai, Alaska, being first duly sworn upon oath, deposes and says:

That on or about the 5th day of December, 1953, I went to the office of the Court Clerk at Anchorage for a renewal of the liquor license for the Inlet Bar at Kenai. Upon the same date, and at the same time I had an application, together with all supporting papers for a renewal license for The Club, also located at Kenai.

I informed the Deputy Clerk, on duty at the counter in the office of the Clerk, that I had recently had a fire at The Club, with about one thousand dollars' worth of damage. I said that I would like to know whether or not I could hold up that application for approximately two or three months until the building was again ready for occupancy.

The young lady on duty advised me that this would be perfectly satisfactory and that I had until June, 1954, as long as it was for a renewal, stating, in substance, "If you want to wait you can wait as long as it is a renewal and you have the necessary sixty-six and two-thirds of the people. You have until the first of July before it is considered a new license."

Further affiant sayeth not.

/s/ RICHARD L. WILSON.

Subscribed and sworn to before me this 12th day of May, 1954.

[Seal]      /s/ EDWARD L. ARNELL,  
Notary Public for Alaska.

My Comm. expires: 6/21/55.

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[Title of District Court and Cause.]

M. O. SETTING CAUSES FOR HEARING

Now at this time upon motion of Edward L. Arnell, counsel for Applicants, Wilson, Ervin and Jones,

It Is Ordered that cause No. L. B. & W. 4217, entitled In the Matter of the Application of L. C. Parnell at Kenai for a Beverage Dispensary to Expire December 31, 1954, and In the Matter of the Application of Jones, Wilson and Ervin for a Retail License to Expire December 31, 1954, be, and they are hereby, set for hearing at 4:00 o'clock p.m. of Wednesday, May 19, 1954.

Entered May 14, 1954.

[Title of District Court and Cause.]

HEARING ON APPLICATION FOR BEVERAGE DISPENSARY LIQUOR LICENSE TO EXPIRE DECEMBER 31, 1954

Now at this time Hearing on Application for Beverage Dispensary liquor license to expire December 31, 1954, in cause No. L. B. & W. 4217, entitled, In the Matter of the Application of L. C. Parnell at Kenai for a Beverage Dispensary License to Expire December 31, 1954, and In the Matter of the Application of Jones, Wilson and Ervin for a Beverage Dispensary License to Expire December 31, 1954, came on regularly before the Court, Applicant Wilson present and with Edward L. Arnell, counsel for applicants; William T. Plummer, United States Attorney, and Clifford Groh, Assistant United States Attorney, present for and in behalf of the Government, the following proceedings were had, to wit:

Richard Leon Wilson, being first duly sworn, testified for and in behalf of the applicants.

Whereupon, cause continued for arguments to May 21, 1954, at an hour to be set later.

Entered May 20, 1954.



[Title of District Court and Cause.]

### M. O. RENDERING ORAL DECISION

Now at this time the Court rendered oral decision in cause No. L. B. & W. 4217, entitled In the Matter of the Application of L. C. Parnell, d/b/a The Club, at Kenai, for a Beverage Dispensary Liquor License to Expire December 31, 1954, and Denied Application, and written decision to follow.

Entered July 2, 1954.

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In the United States District Court for the District of Alaska, Third Judicial Division, Anchorage

In the Matter of:

The Application of L. B. & W. 4217; and the Application of JONES, WILSON and ERVIN, d/b/a "THE CLUB," for Beverage Dispensary License

### MEMORANDUM OPINION

This matter comes before the court based upon the application of L. C. Parnell for a beverage dispensary liquor license for "The Club" at Kenai, Alaska.

The file will reveal that the application was filed on the 13th day of April, 1954. Initially the matter was set down for hearing on the 19th day of May at the hour of 4:00 o'clock.

The file further reveals that C. K. Jones, E. Wells Ervin and Richard L. Wilson prepared an application for beverage dispensary license on the same premises during the early part of December, 1953, however, the same was never filed. These applicants, by affidavit and documentary evidence, set forth the fact that they were advised by a clerk of the District Court that if they did not desire to file at that time they could do so at some subsequent period, but within the six months after January 1, 1954.

The application of Jones, Ervin and Wilson, which is tied into the application of Mr. Parnell in File No. L. B. & W. 4217, were represented by their counsel, Mr. E. L. Arnell, who has submitted a brief in support of the application of Jones, Ervin and Wilson, while L. C. Parnell neither appeared in person nor was he represented by counsel.

Mr. Arnell, attorney for Jones, Ervin and Wilson, advised the court that he did not represent Mr. Parnell and that Mr. Jones, Ervin and Wilson had no connection whatsoever with the application of Mr. Parnell. The file indicates facts to the contrary for on the last page of one of the census we find the following:

“I, L. C. Parnell, the applicant on the attached application, hereby certify that the place of business is 800 feet by the shortest direct route from any school ground or church.

“/s/ L. C. PARNELL.”

And underneath that is the following:

“This is a renewal and not a new license. Only a transfer from Wilson, Jones and Ervin, d/b/a The Club, to L. C. Parnell, d/b/a The Club.”

Nevertheless, even though the evidence is in conflict concerning the respective position of the applications for “The Club” liquor license, the matter is unimportant in the opinion of the court based upon the law, all of which is more fully set forth in the Memorandum Opinion given by this court in the L. B. & W. Liquor License No. 4004, Tony Bordenelli and Eyvohn Bordenelli.

In addition to the memorandum opinion set forth in L. B. & W. No. 4004 these applications, that is, Mr. L. C. Parnell and C. K. Jones, E. Wells Ervin and Richard L. Wilson, make application for a liquor license under 35-4-15 of the 1949 Compiled Laws of the Territory of Alaska, as amended by Chapter 116 of the 1953 Session Laws of the Territory of Alaska, which provides for a renewal.

As to the application of Mr. L. C. Parnell, I am of the opinion that a liquor license is purely personal (53 C.J.S. 643, Section 42; 73 NE 884) and, therefore, it is not available and affords no protection to others and as a general rule a liquor license cannot be transferred without the consent of the license authority unless the license statute provides otherwise (53 C.J.S. 657, Section 45). In Alaska the transfer can only be effected by consent of the court (34-4-13). Also, it has been held “\* \* \* that

a liquor license granting the same privilege to the same person to sell liquor in the same place is a renewal license \* \* \* but a license granted to a different person would not be a renewal." (Appeal of Stavalo, 71 Atl. 549, 550 and 36 Words and Phrases, p. 887.) Thus, the applicant, L. C. Parnell, could not comply with any of these tests, therefore, the application is hereby denied.

In the matter of the application of Jones, Ervin and Wilson, counsel has ably argued and cited considerable law concerning the right of the court under "statutory construction" stating that the court cannot "impose limitations and revisions which are not contained in the law." In this respect the court is not endeavoring to impose limitations or restrictions not intended by the Legislature, nor set forth in the law. However, this court is of the opinion that the definition of the word "renewal" must be strictly construed, therefore, as defined and construed by this court see memorandum opinion of Tony Bordenelli and Eyvohn Bordenelli, L. B. & W. No. 4004, the applicants, Jones, Ervin or Wilson, cannot file at this late date an application for renewal.

I am of the opinion that there must be a valid existing license at the time of the application for a renewal of a license so as to enjoy the qualifications and rights as set forth in Chapter 116 of the 1953 Session Laws of the Territory of Alaska which provides, among other things, that "no license shall be issued for the sale of any intoxicating liquor in

any building within one-quarter of a mile of any school ground or church building outside the corporate limits of a municipality \* \* \* however, that a license may be reissued for the sale of intoxicating liquor in any building which said sale was authorized by law at a time subsequent to March 23, 1949."

I am of the opinion that Jones, Ervin and Wilson are not entitled to a renewal of their liquor license for "The Club" at Kenai for the reason that at the time of their filing of their application there was no valid existing license at the time. I am of the opinion that there must be a valid existing license at the time of the application, otherwise there can be no renewal, therefore, the impact of the 1953 Session Laws of the Territory of Alaska concerning the granting of liquor license comes into full force and effect, and since the applicants are not entitled to a renewal under the old license and since the applicants are not beyond one-quarter of a mile of any school or church building their application must be denied.

Counsel has argued for the applicants, Jones, Ervin and Wilson, that they have been lulled into a sense of, shall we say, "false security" by an officer of the court in that they were advised by the Clerk of the Court's office that they would not have to file at that time, but that they could do it at any time within six months after the first of the year. This, no doubt, is true and very regrettable, but under the case of *Gouge vs. David*, 202 P. 2d 489, I feel that this court is bound by the strict inter-

pretation of the law and because the Clerk of the Court may have misled the applicants in respect to the filing date this court does not have any authority to go beyond the strict interpretation of the law and since the Clerk of the Court, like the Oregon Liquor Control Commission, was acting only in an administrative capacity his representation did not have the authority to bind this court.

Dated at Anchorage, Alaska, this 2nd day of July, 1954.

/s/ J. L. McCARREY, JR.,  
District Judge.

[Endorsed]: Filed July 2, 1954.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that C. K. Jones, Richard L. Wilson and E. Wells Ervin, applicants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final order and opinion in this cause, said order being dated and filed on the 2nd day of July, 1954.

This notice is dated the 30th day of July, 1954.

/s/ E. L. ARNELL,  
Attorney for Applicants, Jones, Wilson and Ervin.

Service of copy acknowledged.

[Endorsed]: Filed July 30, 1954.

[Title of District Court and Cause.]

## APPELLANTS' STATEMENT OF POINTS

The points upon which appellants will rely upon appeal are :

1. That the Court erred in denying appellants' application upon the reason, as stated in the Court's opinion, a renewal upon appellants' application could not be allowed, for the reason that the license for the prior year had expired, and there was, therefore, no valid existing license to renew.

2. That the Court erred in ruling that appellants had to file an application for renewal prior to the end of the year for which a license had been issued, there being no such requirement in applicable statutes.

3. That the Court erred in ruling that applicants did not have the right to rely upon the representations of an employee of the Clerk's office of this court.

4. That said order of denial is contrary to law, for the reason that the Court did not have the power or jurisdiction to interpret such law contrary to the specific provisions thereof, and in effect add conditions not imposed upon applicants by such law.

/s/ E. L. ARNELL,

Attorney for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed August 13, 1954.

In the District Court for the District of Alaska  
Third Division

No. L. B. & W. 4217

In the Matter of:

The Application of L. B. & W. 4217; and the Application of JONES, WILSON and ERVIN, d/b/a "THE CLUB" for Beverage Dispensary License.

TRANSCRIPT OF PROCEEDINGS

May 20, 1954—3:00 P.M.

Appearances:

For the Applicants:

EDWARD L. ARNELL,  
Attorney at Law.

For the Government:

CLIFFORD J. GROH,  
Assistant U. S. Attorney.

The Court: You may proceed, Mr. Arnell.

Mr. Arnell: If your Honor please, I believe the file in this application will reflect that a bond was obtained through the LaBow Haines Company and was dated approximately December 18, 1953. That bond, I am informed, is still in full force and effect, has never been cancelled. I thought earlier this afternoon it had been filed in the Clerk's office at that time, but I was informed by Mr. Dimmock



that the bond itself had been delivered directly to one of the applicants and was not filed until the application was filed last week or whenever it was.

The Court: That will change the affidavits then.

Mr. Arnell: I think not, your Honor. With the Court's permission, I would like to request that the matter of argument be put over until sometime tomorrow at the convenience of the court and at this time we hear only the testimony of Mr. Wilson who actually brought the application and papers to the clerk's office sometime early in December, probably the first week.

The Court: Well, very well, the court hasn't any objection. If you can find time tomorrow afternoon I would be glad to hear argument of counsel.

Mr. Arnell: If the court would care I would like also to call one of the Territorial Legislators to illustrate what the Legislative intent was in the enactment of these various sections.

The Court: The court wouldn't be interested in that. [1\*] The court has gone into that and has his mind made up as to the intent, therefore, it would be a waste of time.

Mr. Arnell: I think, your Honor, it might be helpful irrespective of the attitude of the court at the present time, to know what the legislative people had in mind when this particular section was amended.

The Court: Well, as I stated——

Mr. Arnell: If the court doesn't desire to hear him, I am bound by that decision.

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: No, the court would prefer not to hear it. The court had reason to go into that last fall. You recall the first day I was on the bench I was confronted with this problem, was bombarded about a week or 15 days with every attorney in town on that. I then talked to several legislators on it myself and while my opinion may be wrong, I do have an opinion. I don't want to waste your time or my time on that point.

Mr. Arnell: I would like to call Mr. Wilson.

The Court: Mr. Wilson may come forward and be sworn.

RICHARD LEON WILSON

called as a witness on behalf of the Applicants, being first duly sworn, testifies as follows on:

Direct Examination

By Mr. Arnell:

Q. Would you state your full name? [2]

A. Richard Leon Wilson.

Q. Are you one of the applicants in this proceedings? A. I am, sir.

Q. And you are a co-partner of Mr. Ervin and Mr. C. K. Jones, are you not? A. I am.

Q. You formerly did business under the name of "The Club"? A. That is true.

Q. Would you state to the court what you did in the month of December, 1953, with reference to this pending application?

A. Why, I got the necessary 66 and two-thirds

(Testimony of Richard Leon Wilson.)

consent of the names of the people who were living within a radius of one mile. I got the correct census and had it notarized and brought it in to the Clerk of the Court's office with another application, or two other applications of the same firm. In the meantime we had had a fire and had damaged "The Club" to the extent of approximately \$1,500.

Q. You made reference to two other applications, would you state to the court the names of those establishments?

A. Inlet Bar and Inlet Liquor Store.

Q. Were the applications for those two types of licenses then filed at the time you visited the Clerk's office?

A. They were.

Q. And what time in December was that, as near as you can recall?

A. Well, there is a 21-day waiting period. I would say in the [3] first week in December, as I remember about the 7th, 6th or 7th, something like that.

The Court: In other words, Mr. Wilson, the court files would reflect that, wouldn't they?

A. Yes, they would.

The Court: Thank you.

Q. (By Mr. Arnell): You had this application at the time the others were filed?

A. That is correct.

Q. And would you state to the court why you did not at that time then file this particular application?

A. Well, I asked the lady in the Clerk of the

(Testimony of Richard Leon Wilson.)

Court's office, I explained to her that I had a certain amount of work that I would like to do on this one bar, liquor dispensary I believe it is quoted as, and that if I waited approximately 90 days while I did this work through the winter time before placing my application for a new liquor license, would it be a renewal under the new liquor laws and she said, yes, that I had up to 6 months which would put me the first of June, or the 30th of June, rather.

Q. Had you at that time applied for the bond required under the statute? A. Yes.

Q. And was that bond subsequently obtained?

A. I wrote a letter to Mr. Dimmock which is LaBow Haines Company [4] which handles our bonds from year to year and he informed me that those bonds were being made out and would be in the Clerk's office when I presented my application for my liquor license.

Q. Did anything else occur at the time you visited the Clerk's office with reference to this particular application or have you stated everything as you recall?

A. No, I was under the im—according to the way I thought and the way it was explained to me that I had a period of 90 days or 4 months or 5 months up to 6 months, according to the way she explained to me, to make application for this liquor license and due to that amount of work to do I thought I would wait because I had everything there notarized and all I had to do was put it across the board and put it in.

(Testimony of Richard Leon Wilson.)

Q. And as a result of these assurances you received from that office you withheld filing the application at that time?      A. That is correct.

Q. Completed the renovation and remodeling that you contemplated?      A. That is correct.

Q. Now, Mr. Wilson, were there any violations chalked up against your establishment last year at any time?      A. No, sir.

Q. Never were any violations for which your license could be revoked?

A. I have been in business six years in Kenai and there has never [5] been a violation on them.

Q. To your knowledge has there been any opposition or protest to the granting of this license or any other license that you have had down there?

A. None.

Q. To the best of your knowledge your business reputation down there is good and acceptable to the general public?      A. Very good.

Q. Would you state to the court, Mr. Wilson, how far this particular location is from any school, church or other——

A. Well, it is—under the old license was 200 feet and the nearest where my places are to the nearest place or church that the Club is is approximately 700 feet from the church.

Q. Are there any other buildings of a similar nature—schools or——

A. Then the next place is the Russian Church which is approximately 1,000 feet.

(Testimony of Richard Leon Wilson.)

The Court: You refer to your old license though, Mr. Wilson, you say 200 feet, what do you mean?

A. Under our old license before the new liquor laws were in effect last year you must have your place of business further than 200 feet.

The Court: That is correct.

A. And this license here which I believe should be a renewal is what I think that it should be, a renewal. If it was a new [6] license I wouldn't be bothering the court's time because it is too close to a church under the new license.

The Court: Thank you.

Mr. Arnell: I have no further questions.

The Court: Thank you, Mr. Wilson, you may step down.

Mr. Groh: May I inquire, your Honor.

The Court: Beg your pardon.

### RICHARD LEON WILSON

testifies as follows on

#### Cross-Examination

By Mr. Groh:

Q. Has the church been there for a long period of time, sir?

A. Well, the church has been there, yes.

Q. The closest one I mean.

A. Yes, it has been there, I would say 10 or 12 years.

The Court: That is the one within 200 feet?

(Testimony of Richard Leon Wilson.)

A. No, the closest church is 700 feet away. Under the old license it is 200 feet from the school.

The Court: Why did you make that statement?

A. I am sorry about that. We are over the 200 feet that were needed for the old license. The nearest church is approximately 700 feet which was there. I believe the church was built about 10 years ago and it has been there through the 6 years preceding this license, same license. [7]

The Court: That explains it.

Mr. Arnell: One more question.

The Court: Just a moment, please, you have cross-examination.

Mr. Groh: I just wanted to inquire about a couple of other things.

Q. (By Mr. Groh): Mr. Wilson, do you know who this person was that gave you this authority in the Clerk's office? Do you know whether they had any authority?

A. No, I don't. I presume that she was a clerk in the office and I don't know what her name is and I wouldn't recognize her actually because I never paid that much attention at the time presuming that she knew that she was giving me the correct information.

Q. You didn't discuss it with the Clerk of the Court?

A. No, I didn't. I asked to see the Clerk of the Court and he was out at the time.

Q. Did you, Mr. Wilson, consult your attorney about the possibility of getting a renewal after 4 or 5 months? A. No, I didn't.

(Testimony of Richard Leon Wilson.)

Q. You relied upon the representation of the clerk?

A. I relied on the word of the clerk, yes.

Q. Was this census and petition taken within 6 weeks of the time it was filed, sir? [8]

A. Yes, it was, it was taken within a period of approximately 10 days.

Q. When did you file application for your renewal? I have not read the court file.

The Court: That was in April, I think.

Mr. Arnell: That was in April.

Mr. Groh: I have no further questions.

The Court: That is all then, Mr. Wilson.

(Thereupon, the witness was excused and left the witness stand.)

The Court: Did you want something—

Mr. Arnell: Mrs. Wilson is here in court. She was with Mr. Wilson at the time these applications were taken over to the Clerk's office and she could corroborate his testimony, if you desire.

The Court: The court doesn't question the testimony of the witness in any way. It is just one of those unfortunate things. This court was not advised of what information has been disseminated out of the front office. I should have known, but at that time I was working under hostile circumstances and I didn't have the right of knowing what was going on out in my front office like I do at the present time. It is most unfortunate situation and I appreciate Mr. Wilson, Mr. Ervin and this other gentleman's position. He certainly had the right to rely



upon what they told him out in the front office, but the unfortunate part of the matter [9] is this: That contrary to a business, in my business then I would say that, well, I'd have to make good whatever she told him because he had a right to rely upon the clerks, that is what they are hired for, but the way the court stands at the present time unless you can convince the court to the contrary, even though the employee of the Clerk of the Court represented to the witness to the contrary, unfortunately the court can't change that law nor can the employee, that is the serious part of it, so I am very apologetic to the situation, but I am willing to hear argument of counsel and maybe you can convince me to the contrary.

Mr. Arnell: I am sorry, your Honor, I don't have time to argue it. I am prepared to argue it. We have completed research and I think that while we are not attempting to involve anyone in the Clerk's office or name anyone there, I think irrespective of what was said or done at that time these people are entitled to a renewal and that differs to the court's present attitude and opinion. I think that, your Honor, it is a situation in which——

The Court: That is your privilege.

Mr. Arnell: Which the Legislature, if their administration is derelict or forgetful, you might say, I think the court cannot be placed in the position where it has to substitute, so to speak, what the Legislature should have done and I think the present status of the law, that is precisely what is being asked of the court. [10]

The Court: That is right. I appreciate what you

state, Mr. Arnell, but the Legislature will not and absolutely refuses to take the responsibility. There is no other choice, but for the court to act as legislature and judge, too. It is a most unfortunate and most regrettable situation that ever could exist, but I don't know what we can do about it. We have been placed in this situation. We are of judicial determination because of the fault of the legislature, but there is nothing I can do about it at this time, but I certainly hope the Legislature will have enough backbone and enough intestinal fortitude to do something about it so it doesn't place the court in embarrassing situations. These things should be all spelled out so Mr. Wilson would know exactly what steps to take and shouldn't have to go by guess, as in the past. Is there anything else to come before the court at this time? You may be excused, Mr. Arnell. The court will remain in session to hear Mr. Plummer.

United States of America,  
Territory of Alaska—ss.

I, Iris L. Stafford, Official Reporter of the above-entitled court, hereby certify:

That the foregoing is a full, true and correct transcript on Appeal in the above-entitled matter taken by me in Stenograph in open court at Anchorage, Alaska, on May 20, 1954, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD. [11]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

June 10, 1954, 3:00 P.M.

Appearances:

For the Applicants:

EDWARD L. ARNELL,  
Attorney at Law.

For the Government:

LYNN W. KIRKLAND,  
Assistant U. S. Attorney.

The Court: I believe this was the time set down for the further argument in the case of the Application of L. C. Parnell, Liquor, Beer and Wine License No. 4217, is that correct, Mr. Arnell?

Mr. Arnell: I think it was another application. I don't represent Mr. Parnell. At the time argument was had on this application, I thought your Honor reserved decision pending argument on the application of Wilson, Jones and Ervin.

The Court: Yes, that is correct, yes. Now, you presented, as I recall, Mr. Wilson for testimony?

Mr. Arnell: Yes, we did, 2 or 3 weeks ago.

The Court: Then, you were going to present additional authority on the subject matter, is that not true?

Mr. Arnell: Yes.

The Court: You may proceed.

Mr. Arnell: If your Honor please, Mr. Kirkland: I won't bother your Honor to read the provisions of Chapter 131 of the '53 Session Laws other than to just point them out to the Court and

state that they contain the provisions with respect to renewals. Now, as I understand, the position of the Court at this time is the question as to what a renewal is?

The Court: That is correct.

Mr. Arnell: And whether or not a renewal has to be granted or occur prior to the expiration of the old license. I'd like [13] to point out to the Court that the particular sections of the Code that set up the qualifications for persons who may hold liquor licenses makes no reference to the fact that any person in order to obtain a renewal of license must have any different qualification or that he must file his application for renewal by a specified period of time and I think that is the crux of the entire issue here. In other words, we have a situation in our practice that has gone on for years and the Courts have allowed renewals without reference to the time that the application was filed—in other words, whether or not it was filed before or after December 31st, within the fiscal year. I think the Legislature could well be presumed to have knowledge of that practice. Having knowledge of the practice and having ignored it, I think, implied at least that they intended that it continue because of the continuing circumstances here in Alaska.

The Court: May I interrupt you, please. Is there any decision on that?

Mr. Arnell: Well, unfortunately, it was pointed out before the Court at the last argument, that there is no case, I think, that would be precisely the point. We have matters of statutory construction. I would like to call your Honor's attention, again, to Judge

Dimond's decision in the Alaska Labor Trade Association Case.

The Court: That is the Alta Club?

Mr. Arnell: Yes, which the Court is familiar with. There [14] is an opinion on file which I think is probably dictum and is still pertinent and serves the problem we have here. I think this is taken from page 484, in which Judge Dimond said,

“It is notable that with respect to applications for places outside of incorporated cities no showing is required in the application or otherwise, as to the integrity of the applicant and the desirability of the issuing of a license for the premises mentioned. Apparently, all that is necessary is that such an application be in compliance with the law and the consent of a majority of the local residents \* \* \* That the Court must exercise lawful and sound, and not arbitrary, discretion in granting or refusing licenses \* \* \* At any rate, it is obvious that in all cases the provisions of law must control.”

Now, that would appear to establish the rule here that with respect to applications outside of an incorporated area, the Court does have some discretion as to what license may or may not be allowed, but again, I point out to your Honor that the Legislature has prescribed absolutely no limit or no restriction as to how or when or what manner a license once validly issued shall be renewed. The only cases I can find, your Honor, with respect to what a renewal is, is found in 71 Atlantic.

The Court: 71? [15]

Mr. Arnell: Yes, at page 549, in which the county commissioners had granted a renewal license to a party and he later then sold those premises and applied for a license elsewhere and the new man tried to enjoin the issuance of the new owners—rather, applied for the issuance of a license on the premises as previously licensed and his application was denied, and the Court said, with respect to renewal:

“The trial court rightly held that the license granted Bartley on November 1, 1907, was a renewal within the meaning of 2647 of the General Statutes of 1902. It granted the same privilege to the same person to sell in the same place specified in his license of the previous year \* \* \* A license granted to Stavolo would not have been such a renewal, since it would have been a license granted to a different person.”

I think that, perhaps, is the closest legal definition we could get to renewal and here we have an application by the same people for the same premises.

The Court: Excepting, isn't that somewhat in conflict? Now, I am not sure of my facts on this point, but didn't Mr. Parnell have this place a year ago?

Mr. Arnell: No, I think not, your Honor, I think they are different premises. They might be adjacent to each other, but I do not think they are the same place, in fact, I am sure they are not. [16]

The Court: Are the facts in this case like this: that they had a liquor license here a year ago and

didn't renew it until now? Is that correct, the same individuals?

Mr. Arnell: The same individuals had a license for last year, that is, '53 and according to the testimony, Mr. Wilson came in sometime early in December with all of his papers in order and applied for his bond and presented them to the Clerk or Deputy, rather, and at that time, for some unexplained reason he got into a discussion about the fact that the premises had been partially damaged by fire and they would be in the process of repair for a period of time and it was then that he either asked, or the Deputy volunteered, the idea that it wouldn't be necessary to file the application at that time, but it could be withheld for renewal providing it was done before, I think, June 1st or July 1st.

The Court: Yes, I recall that. How did this Parnell come into play at all?

Mr. Arnell: I had no knowledge of that until I sat in court and heard it discussed and argued.

The Court: What is the name of the establishment that the parties are applying for? What is the name of it?

Mr. Arnell: I think it is called, "The Club."

The Court: That is what this is, too.

Mr. Arnell: Is it?

The Court: Yes. There is an inter-relation there somewhere, [17] Mr. Arnell. While they may have had it a year ago, I believe it's their intent to sell it and that changes the story of it very materially.

Mr. Arnell: I actually have no knowledge of that, your Honor.

The Court: Well, this application was filed on the 13th day of April, 1954, for "The Club," by Mr. L. C. Parnell.

Mr. Arnell: I think, if the Court did see fit to grant the license then it would be within the Court's discretion later, if the observation of the Court is correct, to transfer the license or to either grant or deny it.

The Court: Here is the problem: In the meantime, the new statutes come into existence and with the lapsing of the liquor license after the 31st day of December, 1953, then the question comes up whether or not this is a renewal or not. If it is a renewal, that is one thing; if it is another license, that is something else because then the force and import of the statute passed by the Legislature comes into play which makes this too close then to a church or school—I don't know which it is.

Mr. Arnell: That is true, your Honor, I recognize the fact that the privilege of engaging in the liquor business is something that can be extended or withdrawn almost at the will of the Legislature and it isn't an absolute constitutional right that anyone can exercise. However, in the absence, your Honor, [18] of some specific directives from the Legislature as to what the Legislature intends, in any given set of circumstances, I think then the question of a renewal while it can't be regarded as a matter of right, nonetheless there is some sort of—well I can't use the word right, but that is the only word I can think of which a person under the statute could rely upon to continue this privileged



business, so to speak, and I think the fact that a new application would be rejected, if it were filed in this particular case where an application is made by the same people, that it must be considered as a renewal. As I pointed out earlier, there is no limitation in the statute itself composed by the Legislature and I'd like to cite to the Court, an Arizona case which is not precisely in point, but it is an expression, I think, of the idea that I have in mind and it is found in 57 Pacific Second, at 1225. Now, your Honor——

The Court: 57 Pacific Second?

Mr. Arnell: Yes, 1225.

The Court: I have it.

Mr. Arnell: The Arizona Statute had a similiar provision of that contained in our Code and it set up that licenses had to be issued to qualified electors of the State and then set up certain other requirements of the persons seeking licenses. Then, also, there was prohibition against the issuance of a license within a certain distance of schools and in this particular case, the Attorney General or some other official challenged the [19] right of the applicant to obtain a license because of the fact that there had been a lot of protests filed by parents and people protesting based upon the fact that this license was close to a theater where there was a large traffic of children and women, and what-not, attending the theater and the tax commission ultimately denied the license and the applicant applied for a writ of mandamus and it was allowed and the Court said that,

“It is within the power of the Legislature to fix the locality of places where liquors may be sold and to forbid the issuance of licenses to premises within named distances from schools, churches, etc., and here the Legislature has exercised that power. It has said the only institutions in the state that shall be protected against proximity of places dispensing liquors are public and parochial schools, and as to these has left it discretionary with the tax commission.

“If the Legislature had conferred the general power of licensing liquor dealers on the tax commission when the commission was satisfied of the applicant’s fitness, there is a line of decisions that would uphold the commission’s discretion in refusing a license on the ground of nearness of such places to schools, churches \* \* \*

and so on. They went on and hold that in this case, the Legislature had not affixed a prohibition which would be applicable to this and therefore, the commission had absolutely no right [20] to deny the license even though perhaps objectionable upon public policy and everything else. The tax commission itself had found that the applicants themselves were personally qualified in every way and the only objection to it was based upon the protest and the court held that the mandamus writ should issue because the law was silent upon this particular problem and I point out again here, your Honor,

that our law is silent as to the time and manner and circumstances of renewal.

The Court: Therefore, the Court's got to fill the vacuum.

Mr. Arnell: I don't think, your Honor, that the Court has any duty or any power to fill the vacuum. Again, I point out that the Legislature was cognizant of this practice and I think if they wanted to fill this vacuum if it was assumed to exist, it's incumbent upon the Legislature, not the Court, to do it. I think you have to read the law and determine it in the light it is written and not add to it and I think beyond any question, if your Honor says it interprets the word, "Licensee" to mean that the person must be the holder of a license and that he must file his application before December 31st or he loses his right to renewal, I think the Court is adding something that is not in the law. Now, during the course of discussing this problem there had been discussions that if these people had filed their application before but for some reason or other it had been delayed and they did not consider it until this date that the Court might then still consider the application and [21] grant the license. Now, if we are to take a technical view of the problem, I think that that reasoning, your Honor, is fallacious for the reason that if the Court finds that it's absolutely mandatory that that application had to be filed before December 31st and acted upon by the Court in order to make it a renewal then even though the Court accepted an application but because of dereliction in the Clerk's

Office or because of some other circumstance the license was not issued, say until the 10th of January, following the date of application. I think then that the Court cannot renew it because the renewal, if it is construed in that light must follow before the old license expires and I think there again, the Court is imposing a condition or situation or interpretation into the law that is not there by reason of anything that the Legislature has said, and in support of that, I'd like to cite to your Honor a case of United States vs. Angell at 11 Federal 34, in which there was an indictment; the man was charged selling liquor without having obtained his federal license and he offered in evidence the receipt showing that he paid for the license and the Court excluded it as evidence upon the ground it was incompetent because his own license had expired and even though he had gotten this receipt which related back to the time prior to the charge set forth in the indictment the Court said, well, there was no license and it had expired and the fact that he had made payment and had a receipt but had not received his license, that the receipt [22] itself didn't take the place of the license and couldn't relate back to the time prior to the alleged commission of the offense and the Court in syllabus says,

“If a party having a license to retail liquors or sells or offers to sell after his license expires it is a violation of the law for which he is liable. When the period stated in a license issued to exercise a business for a specific time

expires, the license expires, no matter what stock he may still have on hand.”

Now, I think we would be precisely in the same situation here. Assuming that someone came in and filed an application, your Honor, before the end of December and it was in process but the license actually had not been issued and later he was picked up by a marshal or somebody else and charged with selling liquor without a license because the license hadn't come in the mail and maybe hadn't been issued until the 10th, I think the fact that he filed an application would have absolutely no bearing upon the determination of a charge of that kind. In other words, I think if the Court's instruction is to be followed, every person seeking to engage in the liquor business must in order to renew their license not only have their application on file, I think, but the Court must have acted upon it before December 31st and I think any other interpretation could not be sustained, and there, again, you have an interpretation, your Honor, that is not specific in the law as it is written. [23] Furthermore, I think the Court has no right in putting something into the law that the Legislature should itself put in.

The Court: I can assure you that the Court doesn't want to legislate; yet, sometimes the Court gets in a ridiculous situation where you have to do something.

Mr. Arnell: I honestly feel, your Honor, that you would be in that position and I can't agree with you that it's incumbent upon the Court to ap-

proach this from the point of view that the Court has to plug a loophole or gap that is left by the Legislature.

The Court: I point out to you that the liquor license and annexation statutes are of such a nature unless the Court did something like that, you would never have liquor license and never have annexation.

Mr. Arnell: Well, the point I am trying to make here, your Honor, is there would probably be thousands or at least hundreds of situations that could occur right in this court and I think that if you adopted a view here that you have to plug a gap left in the law by the Legislature that actually, you are just opening the door to a multitude of problems for the Court. I think the past practice actually has been satisfactory. No one has been prejudiced particularly so far as renewal of license is concerned and the statute itself, the way it is worded, says that all that a man has to do to apply for a renewal is to show that he has not been convicted of a crime or violation of the law [24] during the year and he can get a license without a census or without a consent from year to year which seems to me to indicate the intention upon the part of the Legislature that they had in mind these various problems and didn't want to take it any farther than that. Another case, your Honor, which is similar to the Arizona Case that I cited is found in 82 Pacific Second 1099, that is a Colorado Case. I won't bother reading it—and I have several others here, but I think that the ones I mentioned are sufficient to sup-

port the idea that I have tried to express to the Court. Now, the only other point, your Honor, that I wish to make relates to the question of construction of a statute and here, again, I don't have a case involving whiskey, but the rule adopted by the Supreme Court, I think, is appropriate to this matter because of the gap or so-called gap that the Legislature left in this particular law. The case is found in 143——

The Court: Again, please.

Mr. Arnell: 143 U. S.

The Court: Thank you.

Mr. Arnell: At 457 and this involves an action, your Honor, on the part of the United States Government to collect a fine for bringing an alien into the United States in violation of, I guess they call it, the Alien Law or something, I don't see it here now—anyway, in this case, the church had entered into an agreement whereby a minister or church official in England [25] was brought into this country and this was construed to be an agreement in violation of this particular act for bringing an alien into the country and the government brought suit to collect the penalty and then the Court said that,

“It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application.”

That particular quotation is found at 459; and then 461 the Court went on to say that—in its opinion, the Court says, referring to another case,

“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.”

Then, the Court goes on there and several others are cited by Sutherland in the Third Edition which is here in the library in Volume 2, Sections 4502 and 4505, and I'd like to quote or read to the Court the one on page 316 which reads as follows:

“Thus, the assertion that a statute which is ‘clear and unambiguous’ needs no interpretation is, in fact, evidence [26] that the Court has considered the meaning of the statute and reached a conclusion on the question of Legislature intention. In many cases this will be a proper conclusion but frequently it merely disguises the Court’s unwillingness to consider evidence other than the Court’s own impression of what the Legislative intent is. Courts should not lose sight of the fact that statutory interpretation, whatever it may be called, so far as function of the courts and juries is con-



cerned, is a fact issue. Where available, the courts should never exclude relevant evidence on that issue of fact.”

Now, the Court in this particular case has not heard any evidence as to the intent of the Legislature, but I think probably it would be a proper matter for the Court to consider. Sutherland in another quotation, page 320 says that,

“Independent judicial”—

The Court: What is the volume on that?

Mr. Arnell: Same volume, Volume 2, Section 4505. It says that,

“Independent judicial determination arrived at exclusively from the reading of words in the statute does not insure accurate interpretation and thus for the court to assert that the statute is clear and unambiguous is merely to assert that the statute, as read by the Court, produces a result which is satisfactory to the Court. It does [27] not necessarily mean that as read it reflects the Legislative intent.”

Now, I think it is unfortunate that that is the position the Court is in here. In the absence of an expressed directive from the Legislature saying that this shall be done and that shall be done, the Court, I think, there being no prohibition, must go as it has in the past and accept these applications. I think to do otherwise would in this particular case set up a precedent that would probably never be an answer in any other case that would ever come be-

fore the Court and as I pointed out a minute ago, I think the Court is merely creating problems for itself in trying to meet these various situations as they will arise because they will all be different and yet the Court will be confronted with these different questions of fact and everything which——

The Court: Yes, but Mr. Arnell, don't you think the Court can rule on the interpretation of renewal and settle it once and for all?

Mr. Arnell: Well, I think, your Honor, in the absence of some directive from the Legislature as to what a renewal is, I don't——

The Court: Well, we don't have that, so the Court is going to have to determine what a renewal is.

Mr. Arnell: That case, your Honor—the point I am trying to make is, I don't think the Court can legislate. What you are [28] doing, you are attempting to design it for the Legislature and impose it on the law.

The Court: And I stress judicial rather than press legislative action, but I point out to you, Mr. Arnell, that is common practice of the Court when a question of interpretation or the definition of a word comes up, the Court has to do it, repeatedly.

Mr. Arnell: That is true, with respect to one word, your Honor, but here you are construing the entire statute and you can't construe it in such a way as to arrive at what you think the results shall be or in such a way as to do something which you in your own mind feel the Legislature should have done, but hasn't done. I think that, and your Honor

will, I think, readily recognize that all the cases that were cited in the last argument, in support of the opposition to the granting of a license were cases involving specified procedure and many of them the statutes expressly said that a certain thing had to be done by a certain time and here, we don't have any such thing. In fact, the Legislature has said in one way that a license shall not be granted for a period of less than 6 months. Now, that can be read a dozen of ways depending on what might be desired, but I think that, again, your Honor, is an expression of the legislative intent that a renewal license or a new license provided that it meets the qualification could be issued for a period of 6 months or could be issued at 9 months or 11 months. I don't see that there is any other alternative to the construction and if the [29] Court picks out one word such as "renewal" or another word such as "licensee," and says that these are the keys to the entire issue, then the Court, I think, is filling in the gaps of what Sutherland has described here where the Court is arriving at a conclusion which to the Court seems just, but which the Legislature has not expressly or even by inference covered, and in other words, the Court is making law where the Legislature has failed to do so. If that is the effect of this law,—I don't admit your Honor, that the Legislature failed. I think that we can rely upon the fact that the Legislators, many of them lawyers, know how these things are handled and if the renewals or the applications for less than a year were

not handled properly and there were complaints and various things, I think all of these points would have come up and been considered by the Legislature and I think then we would have had an act that said if a person wants a renewal he would have to file his application by December 15th of each year and license must be issued or it's out.

The Court: Let me go back to fact, just a moment. Aren't the facts in this case that in the year 1953, that Jones, Wilson and Ervin had the license? Aren't the facts also that on or about the 8th day of December, the same individuals made application but never did complete their application—they prepared it but didn't file it. And aren't the facts further supported by this, that one Mr. Parnell made application for the same [30] liquor license, "The Club" at Kenai on the 13th day of April, 1954, and aren't the facts further supported by this, that thereafter, believing there might be a question as to whether or not Mr. Parnell could get it, that the said Ervin, Wilson and Jones came in and made subsequent application for the same license?

Mr. Arnell: I think not to that, your Honor, but I don't know, and I'd be perfectly willing to call Mr. Ervin or any others in here. I think at the time there was negotiations for the sale of or lease of the premises or something and what happened to those, I can't say.

The Court: Well, I point out to you that they have an affidavit here stating that they had—did prepare such an application on or about the 8th

day of December, 1953, to renew the license in "The Club" and I will point out to you that the file reveals Mr. Parnell did file on the 13th day of April, but I don't have a date beyond that point. Mr. Hilton, do you have anything whereby Mr. Ervin, Wilson and Jones did file after Mr. Parnell filed for this?

The Clerk: Not afterwards, no.

The Court: Well, then, isn't the real applicant for this liquor license then Parnell?

The Clerk: Parnell—their claim was that they had transferred their interest down there to Parnell and it was expected that Parnell could apply for this same license and receive [31] it. Parnell said it is a renewal or supposed to be a renewal of the former license issued to Ervin, Wilson and Jones.

The Court: That is the record, Mr. Arnell.

Mr. Arnell: I will have to straighten that out, your Honor, I am sorry about that.

The Court: And that is a different situation than what you think it is.

Mr. Arnell: I agree with the Court on that, but my recollection of this transaction came to me piece-meal and it was that this application for renewal was based upon the fact that he couldn't get a license.

The Court: Well, here is the file and that is what the file reveals here. The affidavit states in here that he says here pursuant to—just a moment, please,—by Mr. Wilson. It says in his affidavit,

"That on or about the 5th day of December,

1953, I went to the office of the Court Clerk at Anchorage for a renewal of the liquor license for the Inlet Bar at Kenai. Upon the same date and at the same time I had an application together with all supporting papers for a renewal license for 'The Club,' also located at Kenai.

"I informed the Deputy Clerk on duty at the counter in the office of the Clerk that I had recently had a fire at 'The Club,' with about one thousand dollars' worth of damage. I said that I would like to know whether or not I [32] could hold up that application for approximately two or three months until the building was again ready for occupancy."

And then he states, the young lady on duty advised him that,

"If you want to wait, you can wait as long as it is a renewal and you have the necessary sixty-six and two-thirds of the people. You have until the first of July before it is considered a new license."

But, you see, the application being considered by this Court at the time only is the application of L. C. Parnell of "The Club."

Mr. Arnell: No, we filed an application, your Honor, for renewal.

The Court: It isn't before the Court in the file.

Mr. Arnell: Well, it was filed. That is what I thought we were arguing on.

The Court: Did you file an application for the year 1954, subsequent to December 8, 1953, by Mr. Jones, Mr. Wilson and Mr. Ervin?

Mr. Arnell: Yes.

The Court: Will you please come forward, Mr. Arnell.

(Thereupon, Mr. Arnell and Mr. Kirkland and the Deputy Clerk approached the bench and had an off-the-record discussion.)

The Court: Well, in light of the misunderstanding of [33] counsel in respect to the application of Jones, Wilson and Ervin, which is made out on the 8th day of December, 1953, and which has never been filed, but which has in fact been admitted in the same case as that of Mr. Parnell, I think this case should be continued until these facts are established by counsel and the Clerk of the Court.

Mr. Arnell: Does your Honor want me to bring Mr. Ervin in here to explain this Parnell deal?

The Court: Well, the Parnell deal speaks for itself, Mr. Arnell. I think it is a problem for you to work out with the Clerk of the Court as to the application of Ervin, Wilson and Jones of December 8th, 1953, as to when that application was supposed to have been filed.

Mr. Arnell: That was supposed to have been filed here recently and I don't know why it is not in that file. I think it has no relation to the Parnell application and so far as I know there is no existing deal or anything else transferring any license if it

were granted by the Court to Parnell or anybody else.

The Court: Well, there was—at one time there was a relation between the two because at that time——

Mr. Arnell: There was a proposal at least at one time, but I don't know.

The Court: I think counsel better look into that with Mr. Ervin and Mr. Hilton, Clerk of the Court, before we can go [34] further.

Mr. Arnell: All right, I will try to do that tomorrow.

The Court: As soon as we possibly can, I'd like to rule on that.

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United States of America,  
Territory of Alaska—ss.

I, Bonnie T. Brick, Special Official Reporter of the above-entitled Court, hereby certify:

That the foregoing is a full, true and correct transcript on Appeal in the above-entitled matter taken by me in Stenograph in open court at Anchorage, Alaska, on June 10, 1954, and thereafter transcribed by me.

/s/ BONNIE T. BRICK.

[Endorsed]: Filed August 20, 1954. [35]



[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD  
ON APPEAL

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceedings designated to constitute the record on appeal, plus the remainder of said original file, including the transcript of arguments of counsel and statements of Court had at the hearing of the cause.

The papers herewith transmitted constitute the record on appeal from the order and opinion filed and entered in the above-entitled cause by the above-entitled Court on July 2, 1954, to the United States Court of Appeals at San Francisco, California.

[Seal]      /s/ WM. A. HILTON,  
Clerk of the District Court for the District of  
Alaska, Third Division.

Dated at Anchorage, Alaska, this 31st day of  
August, 1954.

[Endorsed]: No. 14,500. United States Court of Appeals for the Ninth Circuit. In the Matter of the Application of L. B. & W. 4217; and the Application of Jones, Wilson and Ervin, d/b/a "The Club" for Beverage Dispensary License, C. K. Jones, Richard L. Wilson, and E. Wells Ervin, Appellants. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed September 2, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Circuit Court of Appeals,  
Ninth Circuit

Cause No. 14500

In the Matter of:

The Application of L. B. & W. 4217; and the Application of JONES, WILSON and ERVIN, d/b/a "THE CLUB" for Beverage Dispensary License,

Appellant.

ADOPTION OF STATEMENT AND  
DESIGNATION

Comes now C. K. Jones, Richard L. Wilson and E. Wells Ervin, Appellants, by their attorney, E. L. Arnell, pursuant to the provisions of Rule 17 of the Rules of this Court, and hereby adopt for all purposes of this appeal the designation of record and statement of points contained in the record heretofore filed in this Court.

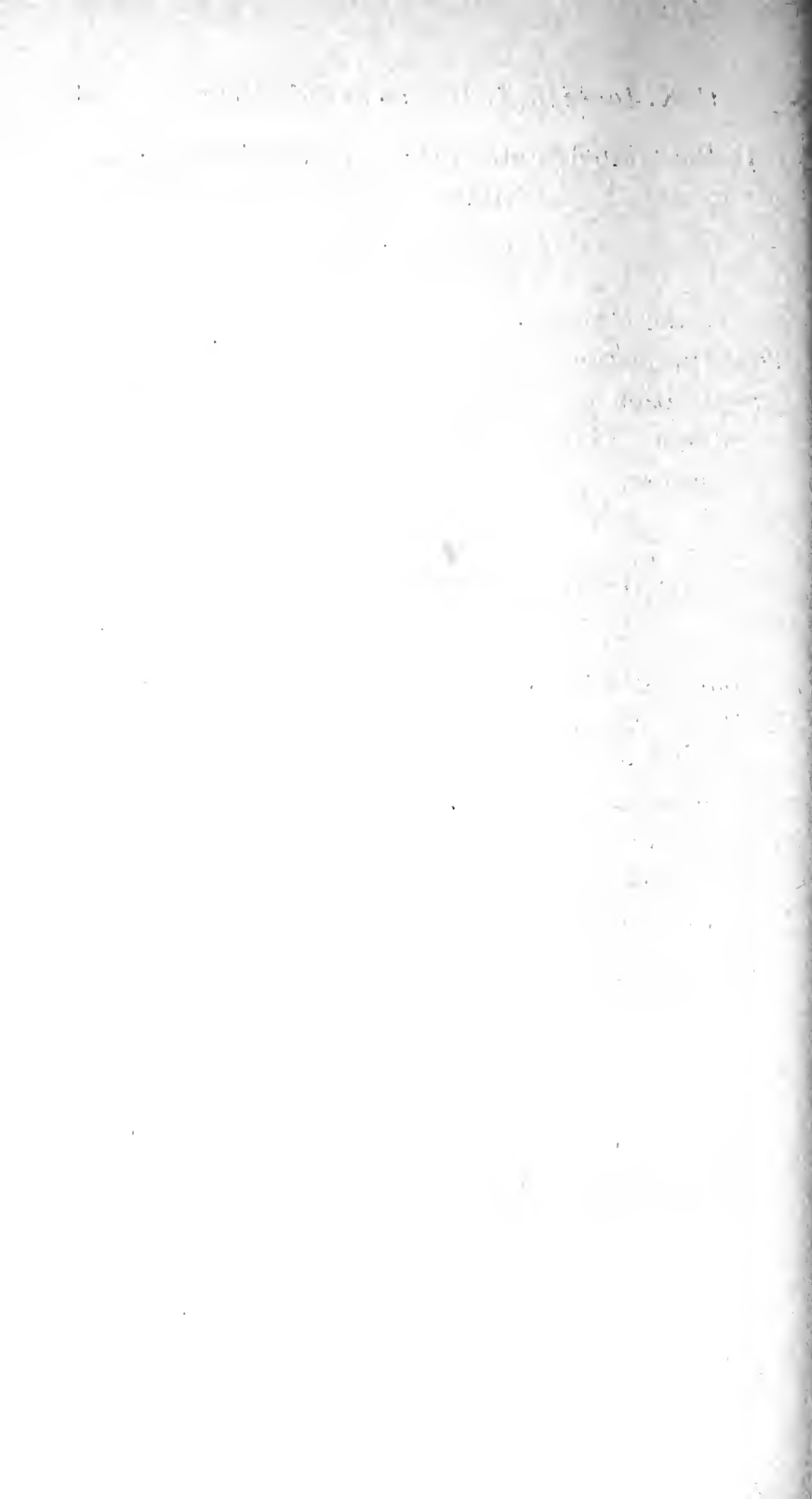
Dated this 7th day of September, 1954.

/s/ E. L. ARNELL,

Attorney for Appellants.

Service of Copy acknowledged.

[Endorsed]: Filed September 13, 1954.



**No. 14,500**

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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In the Matter of the Application of  
L. B. & W. 4217; and the Applica-  
tion of JONES, WILSON AND ERVIN,  
d/b/a "THE CLUB" for Beverage  
Dispensary License.

**On Appeal from the District Court for the  
District of Alaska, Third Division.**

**BRIEF FOR APPELLANTS.**

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**FILED**

**FEB 15 1955**

**PAUL P. O'BRIEN,**  
CLERK



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[illegible]

1. *Journal of the American Medical Association*, 1997; 278: 1023-1028.

No. 14,500

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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In the Matter of the Application of  
L. B. & W. 4217; and the Applica-  
tion of JONES, WILSON AND ERVIN,  
d/b/a "THE CLUB" for Beverage  
Dispensary License.

**On Appeal from the District Court for the  
District of Alaska, Third Division.**

**BRIEF FOR APPELLANTS.**

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**JURISDICTION.**

This is an appeal taken from a decision and order (R. 17-22), denying the appellants' application for renewal of a liquor license under Alaska Statutes.

The District Court had jurisdiction in the proceeding by virtue of the provisions of Section 35-4-12, et seq., as amended, Alaska Compiled Laws Annotated, 1949, and Title 48, U.S.C.A., Section 101.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of said appeal by virtue of the provisions of Section 1291 of Title 28 of the *United States Code* (as amended Oct. 31, 1951, c.

655, Sec. 48, 65 Stat. 726). This appeal is governed by Section 1294 of Title 28 of the *United States Code* (June 25, 1948, c. 646, 62 Stat. 930, as amended Oct. 31, 1951, 65 Stat. 727).

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### STATEMENT OF THE CASE.

Appellants, in 1953, held a beverage dispensary license issued under applicable statutes of Alaska.

In December, 1953, Wilson, one of appellants, acting on behalf of all, presented to the Clerk's office in Anchorage an application for renewal of that 1953 license. Upon the assurance of an employee of such office that such application could be filed any time before June 30, 1954, Wilson, for the reasons appearing in the record (R. 14, R. 21, R. 32) did not then file the application (R. 3-9, R. 9-11). The information given to appellants by a member of the Clerk's staff (R. 14, R. 21 and R. 32) is not controverted.

Having relied upon such information, appellants, in April, 1954, filed their application (R. 3-9 and R. 9-11) for renewal of the 1953 license. Hearings by the Court were held upon such application (R. 15-16, R. 24-36) and resulted in a denial of appellants' request for renewal of their license. The reasons adopted by the trial Court in denying the application appear in the record at pages 25, 26, 34, 43 and 45.

From this denial (R. 17-22), appellants have appealed.

**ARGUMENT.****I.**

**THAT THE COURT ERRED IN DENYING APPELLANTS' APPLICATION FOR THE REASON, AS STATED IN THE COURT'S OPINION, A RENEWAL UPON APPELLANTS' APPLICATION COULD NOT BE ALLOWED, FOR THE REASON THAT THE LICENSE FOR THE PRIOR YEAR HAD EXPIRED, AND THERE WAS, THEREFORE, NO VALID EXISTING LICENSE TO RENEW.**

Prior to the license year 1954, the District Court, Third Division, had granted renewals of liquor licenses whether the applications therefor were filed and acted upon before or after December 31st, which, under territorial law, was the expiration date of all liquor licenses. By granting renewal of licenses upon applications filed after the expiration date of the prior license, the Court had established precedent for the practice noted.

Section 35-4-12, et seq., of Alaska Compiled Laws, Annotated, 1949 prescribe generally the qualifications of applicants and the manner of issuance of liquor licenses.

While the 1953 legislature adopted several amendments to the liquor code of Alaska, no substantial changes were made. Licensees' qualifications were not changed. With at least presumptive knowledge of past practices, the 1953 legislature adopted the following amendment:

“. . . no further proof of the consent of the citizens of the place . . . will be required . . . from year to year so long as the licensee shall not have been found guilty of an infraction of the Territorial liquor laws; provided, applicant

shall file a sworn statement to the effect that applicant has not been convicted . . .”

—Chapter 131, Session Laws of Alaska, 1953.

This amendment represents a liberalization of the old renewal provisions, notwithstanding the precedent and prior practices of handling such applications. If the legislature had intended more rigid consideration of renewal applications, why, then did it not act? The answer to this question appears, at least presumptively, to be that the legislature approved of the prior practice in renewal of licenses.

Another provision of our code, which is appropriate, is found in Section 35-4-15(8), *supra*, which reads:

“ . . . and all licenses thereafter shall be issued for the fiscal year, ending December 31, but *no license shall be issued for less than one-half year.*” (Emphasis supplied.)

The cited statutory provisions make no distinction between “new” or “renewal”. The necessary implication of this phraseology is that a license may be issued for less than a full fiscal year. With knowledge of the interpretations applied by the Court to the then existing provisions, the legislature should have included specific limitations on the procedures to be followed in renewing licenses.

Instead, the 1953 legislature, in effect, rather than restricted, liberalized the law relating to renewals.

The present law must be construed, if at all, as a whole and not dissected into numerous parts, each

of which may be examined and interpreted separately. The context as a whole must control, and if the law is deemed incomplete, the trial Court had neither the duty, nor the jurisdiction, to exercise legislative functions.

Upon the proposition that the whole context of an act must be construed the attention of the Court is called to *Barron v. Kaufman*, at page 788, where it is said:

“To give the section the construction contended for by appellant there would have to be read into it the words ‘for each meeting attended.’ It must be presumed that the Legislature intended the meaning the words they actually employed express, *as read in conjunction with other clauses and sentences of the section*. The interpolation of words into an act by construction is allowable only when it is necessary in order to rescue the enactment from an absurdity. . . .” (Emphasis supplied.)

—*Barron v. Kaufman* (Ky.), 115 S.W. 787.

In the proceedings appealed from, the trial Court violated this basic rule of statutory construction by isolating the word “renew” or “renewal”. In the Bordenelli opinion to which the trial judge (R. 20) referred, the words “renew” and “renewal” are defined as follows:

“Webster’s New International Dictionary, Second Edition, defines the word ‘renewal’ n. ‘renewing, or state of being renewed’. The same authority defines the word ‘renew’ v. transitive:

(1) To make new again; to restore to freshness, perfection, or vigor; also, to begin again

as new; to reassume; as, to renew one's strength.

(2) To make new spiritually; to regenerate . . .

(3) To restore to existence; re-establish; re-create; rebuild; as, to renew the old splendor of a palace; to revive; to resuscitate; as, to renew the sentiments of youth.

(4) To repeat; to go over again; to make or do again . . .

(5) To begin again; to recommence; to resume . . .

(6) To replace; also, to restore to fullness or sufficiency . . .

(7) To grant or obtain an extension of; to continue in force for a fresh period."

This Court in the case of *Campbell River Timber Co. Ltd. v. Vierhus*, 86 F. 2d 673, in speaking of a different situation involving the Internal Revenue Code, adopted a similar definition in the word renewal.

The Court in the Bordenelli opinion further stated:

" 'The term "renewal" has no strictly legal or technical signification, and it is not a word of art. It may be given different meanings, and it has different meanings, varying with the subjects with reference to which it is used. The cases construing the proper meaning to be ascribed to the term are by no means uniform; contracting and the construction is controlled by the intention of the parties.' "



In the decision herein, the trial Court stated:

“However, this court is of the opinion that the definition of the word ‘renewal’ must be strictly construed, therefore, as defined and construed by this court see memorandum opinion of Tony Bordenelli and Eyvohn Bordenelli . . .”

Strict construction of the word “renewal”, which, as stated by the trial Court, has no strictly legal or technical signification, makes manifest the inconsistencies of the rules and interpretations adopted by the Court.

Our statutes, Section 35-4-12, et seq., Alaska Compiled Laws Annotated, 1949, and Chapter 131, Session Laws of Alaska, 1953, supra, impose no condition as to the date when an application must be filed. Since applicants had committed no infractions of the law and since no protests have been filed (R. 29) they were entitled to a license.

This case differs from the case of Bordenelli, cited by the Court (R. 19) where protests had been filed and a license revoked. Without commenting upon the merits of this decision, it is sufficient to say that the situation here presented differs materially from that, in the circumstances outlined, and also with reference to misleading information furnished these appellants by a Court officer, more fully considered under Point III.

The Court’s attention is invited to the case of *Schroeder v. O’Neill, et al.*, which is a case where licensees of the board of township commissioners re-

lied upon resolutions extending time of building upon lots, until a year after the termination of certain litigation. There, at page 683, the Court commented:

“‘It should require circumstances of a very strong and controlling character to induce the Court to reverse a rule long in existence in this state in regard to property.’ *Elkin v. So. Ry. Co.*, 156 S.C. 390, 153 S.E. 337 . . .

“‘It would seem unjust and inequitable to the lotholders who had paid \$100.00 each for their licenses and who until after this suit was brought continued to pay their annual assessments of \$10 a year on these lots; which payments were accepted and retained by the board, to hold that these lotholders, who refrained from building, presumably in reliance upon the extension granted them by the board until the controversy should be settled, should lose their rights . . .

“‘A municipal or other subordinate governmental agency, such as this board of township commissioners, can be bound by an estoppel in cases such as the present. (Citing many cases) . . .

\* \* \* \* \*

“‘The payment of the initial license fees by these lotholders and annual assessments or renewal license fees of \$10 per year per lot thereafter until after the commencement of this action, in reliance upon their license which they had bought, and the official resolutions of the board extending the time to build, coupled with the acceptance of these payments by the board . . . and the board and all other lotholders on the island standing by and permitting these parties to spend their money in the original acquisition and the

renewal assessments, all these would seem to make out a very clear and strong case of equitable estoppel. *It would also be a somewhat inconsistent position for the board, or the two succeeding boards to issue the licenses, accept the payments, extend the time for building, and then claim that the lotholders must be restrained from building or compelled to desist from building.*" (Emphasis supplied.)

—*Schroeder v. O'Neill, et al.* (S.C. 1936), 184 S.E. 679.

The trial Court was, therefore, in error in concluding that appellants' application should be denied because there was nothing to renew, the 1953 license having expired. Upon the statutory provisions cited, *supra*, an incident of the 1953 license was the right of "renewal" and in the absence of an express statutory provision, appellants could not be deprived of that incidental right or privilege. Since such incidental privilege had not expired by reason of any express provision of the liquor law, the decision of the trial Court was erroneous.

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## II.

**THAT THE COURT ERRED IN RULING THAT APPELLANTS HAD TO FILE AN APPLICATION FOR RENEWAL PRIOR TO THE END OF THE YEAR FOR WHICH A LICENSE HAD BEEN ISSUED, THERE BEING NO SUCH REQUIREMENT IN APPLICABLE STATUTES.**

As pointed out under Point I above, our legislature did not specify that a renewal application must

be filed before any specified date. While the liquor business is related to the public good and, therefore, has been construed to be a privilege, it is, nonetheless, a lawful business that cannot be destroyed by unreasonable application of the law. Despite being considered as a privilege, a license does possess some of the attributes of "property". The decision of the trial Court must rest entirely upon proper statutory construction.

The scope of judicial construction is aptly reviewed in the following authorities:

Mr. Sutherland states: "Thus, the assertion that a statute which is 'clear and unambiguous' needs no interpretation is, in fact, evidence that the Court has considered the meaning of the statute and reached a conclusion on the question of legislative intention. In many cases this will be a proper conclusion but frequently it merely disguises the Court's unwillingness to consider evidence other than the Court's own impression of what the legislative intent is. Court should not lose sight of the fact that statutory interpretation, whatever it may be called, so far as the function of Courts and juries is concerned, is a fact issue. Where available, the Court should never exclude relevant evidence on that issue of fact."

—Sutherland's Statutory Construction, Vol. 2,  
Section 4502, pp. 316-317.

In this connection, the following passages from the record are quoted (R. 25):

"The Court. The court wouldn't be interested in that. The court has gone into that and has his

mind made up as to the intent, therefore, it would be a waste of time.”

and again at page 26 of the record as follows:

“The Court. No, the court would prefer not to hear it. The court had reason to go into that last fall. You recall the first day I was on the bench I was confronted with this problem, was bombarded about a week or 15 days with every attorney in town on that. I talked to several legislators on it myself and while my opinion may be wrong I do have an opinion.”

Mr. Sutherland states further:

“Independent judicial determination arrived at exclusively from the reading of words in the statute does not insure accurate interpretation and thus for the Court to assert that the statute is clear and unambiguous is merely to assert that the statute, as read by the Court, produces a result which is satisfactory to the Court. It does not necessarily mean that as read it reflects the legislative intent.”

—Sutherland on Statutory Construction, Third Ed. Vol. 2, Section 4505, at pp. 320-321.

In the cases of

*Caminetti v. United States*, 242 U.S. 470 (1916);

*Diggs v. United States*, 61 L. Ed. 442;

*Hays v. United States*, 37 Sup. Ct. 192,

the Supreme Court of the United States commented:

“Where the language of a statute is plain and does not lead to absurd or impracticable results, there is no occasion or excuse for judicial con-

struction; the language must then be accepted by the courts as the sole evidence of the ultimate legislative intent, and the courts have no function but to apply and enforce the statute accordingly.”

The case of *Palmetto Fire Ins. Co. v. Beha* is a corporate case, the plaintiff being incorporated in South Carolina, and defendant Beha being the Superintendent of Insurance in New York. The latter sought to show a violation of law by the plaintiff and to revoke its license, whereupon plaintiff sought an injunction and the Court, as page 510, commented:

“It may be that the state could provide as a condition of obtaining a license that no licensee could insure cars within the state of New York, *but the statute does not cover such a case.*

“We adhere to our original decision.” (Granting the injunction.)

—*Palmetto Fire Ins. Co. v. Beha*, 13 F. 2d 500 (N. Y. 1925).

Appellants recognize that the issuance or renewal of liquor licenses is a valid exercise of police power but they contend that, in the exercise of its discretion, the Court has, by its decision, read into the statute a limitation which the legislature did not set forth. (See R. 34, R. 43 and R. 45.)

The United States Supreme Court cited a leading case, in the following case:

“‘All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression

or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' ”

—*Holy Trinity Church v. United States*, 143 U.S. 459, at page 461, citing *U.S. v. Kirby*, 7 Wall. 482.

In the case of *Boise Street Car. Co. v. Ada County*, an Idaho case, the Court commented:

“Undoubtedly in certain cases the courts do have the power to read words into an act, but it is a power that should be exercised with caution and should be indulged only when the omission is palpable and the omitted word indicated by the context. Where the omission is not plainly indicated and the statute, as written, is not incongruous or unintelligible and leads to no absurd results, the court is not justified in making an interpolation. 2 Lewis’ Sutherland, Statutory Construction, Sec. 382.”

—*Boise Street Car. Co. v. Ada County*, 50 Idaho 304, 296 Pac. 1019.

The trial Court, by assertedly construing the word “renewal” strictly, to use the words of Mr. Sutherland, has “reached a conclusion on the question of legislative intention.” The Court (R. 26) relied upon information obtained from several legislators, and yet appellants’ offer of similar evidence was denied. This certainly was a violation of the rule expressed by Mr. Sutherland, *supra*, and such evidence should have been accepted by the Court.

The language of the statutes, *supra*, is neither uncertain nor ambiguous, and interpretation of those provisions, as written, would not lead to absurd or impractical results. Without the trial Court's unnecessary interpretation, the issuance of the license would have followed in accordance with prior precedent and practices in handling such applications. Such result would not have violated any legislative intent that is apparent solely from the law as written. The present decision deprives appellants of properties of considerable value that were acquired and maintained by renewal in prior years under the same provisions on which the trial Court relied, by interpretation, to deny the application. This result certainly is not justified by the trial Court's construction.

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### III.

**THAT THE COURT ERRED IN RULING THAT APPLICANTS DID NOT HAVE THE RIGHT TO RELY UPON THE REPRESENTATIONS OF AN EMPLOYEE OF THE CLERK'S OFFICE OF THIS COURT.**

Attention of the Court is called to the affidavit of Richard L. Wilson (R. 14) and his testimony (R. 26-R. 32), and the statement of the Court (R. 32) to the effect that no question was raised as to the truth of such affidavit and testimony, further to the opinion of the Court with reference thereto, (R. 21) and the statements of the Court. (R. 32-33.)

The office of the Clerk of the Court was established by Title 48, Sec. 106 in the following language:



“ . . . Each clerk shall, in his division perform the duties required or authorized by law to be performed by clerks of United States courts in other districts and such other duties as may be prescribed by the laws of the United States relating to the district of Alaska . . . He may appoint necessary deputies and employ other necessary clerical assistance to aid him in the expeditious discharge of the duties of his office, with the approval of the court or judge . . . ”

Section 104 reads as follows:

“ The respective judges of the Court shall appoint and at pleasure remove, clerks and commissioners in and for the Territory, who shall have the jurisdiction conferred by law in any part thereof . . . ”

The Court, in his opinion (R. 21) refers to such deputy as an officer of the Court and no contention has been made to refute the statement of witness Richard L. Wilson with reference to the misleading information given him. Likewise, appellants' reliance thereon is uncontroverted. Attention of the Court is invited to the case of *Farrell et al. v. Placer County et al.* (Calif. 1944) 145 P. 2d 570. At page 571 (plaintiffs having been told certain things by representatives of the defendant and relying thereon) the Court commented:

“ ‘Plaintiffs believed the said representations of defendants made through their agent, . . . and relied thereon and by reason thereof did not for several months after the making thereof, as aforesaid, employ an attorney to recover their

damages for injuries against the defendants, suffered as aforesaid, and did not take any steps or proceedings whatsoever relating thereto.'

"It has been said generally that a governmental agency may not be estopped by the conduct of its officers or employees (10 Cal. Jur. 650, 651) but there are many instances in which an equitable estoppel in fact will run against the government where justice and right require it. (Citing many cases.) . . . It has been aptly said: 'If we say with Mr. Justice Holmes, "Men must turn square corners when they deal with the Government" it is hard to see why the government should not be held to like standard of rectangular rectitude when dealing with its citizens.' 48 Harv. L. Rev. 1299.

". . . They advised her not to employ counsel, thus lulling her into a sense of security and persuading her not to avail herself of legal assistance in the protection of her rights. . . . Plaintiffs believed and relied upon those statements and conduct of defendants, and as a result, did not consult with counsel or take any proceedings in regard to her claim. It is pertinently said in *Times-Mirror Co. v. Superior Court*, 3 Cal. 2d 309, at page 331, 44 P. 2d at page 557: 'Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. "It has always been the pride of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication." Hum-

boldt Sav. Bank v. McCleverty, 161 Cal. 285, 119 P. 82, citing Story's Equity Jurisprudence, Sec. 28, 439; 1 Pomeroy's Equity Jurisprudence, Sec. 60.'

\* \* \* \* \*

"It has been intimated by some authorities that the claim statute is the measure of the power of the governmental agency in paying the tort claims involved, and hence any deviation from that procedure cannot be dispensed with by waiver, estoppel, or otherwise. The conclusion, at least with respect to the time of filing the claim, is not supported by the statute or reason."

It would thus appear that the later trend of decisions is definitely to the effect that liquor licenses partake of the nature of property and where one is deprived thereof, he loses something more than a mere privilege, particularly in the case of renewals.

Appellants had the right to rely upon the representations of the office of the Court Clerk and have suffered loss as a result of such misleading information. The judge, in passing upon the application, recognized this fact. (R. 33.)

The case of *Selover v. Sheardown* (Minn.) 76 N.E. 50, is in point with reference to misinformation and the consequent loss of rights by certain parties. In that case one of a group of attorneys was given false information via telegram signed by a United States Deputy Clerk as to an entry of judgment and as a result thereof, the attorneys did not file their appeal in the Circuit Court in time, and thereafter the appeal was dismissed after the attorney and his asso-

ciates had expended several hundred dollars for printing of the record. Thereupon, they sued the deputy for damages, the deputy demurred, the lower Court sustained, and the Supreme Court reversed.

The Supreme Court further commented in the Confiscation Cases (*U.S. v. Clarke*) 20 Wall. 92, 22 L. ed. 320, at page 111:

“An Act of Congress authorized the employment of the deputy and in general, a deputy of a ministerial officer can do every act which his principal might do.”

Appellants in this proceeding certainly relied upon the representations made to them by an officer of the Court and certainly by reason of such reliance acted to their own detriment, losing substantial property rights thereby.

Appellants, having relied upon an officer of the Court, cannot for that reason be deprived of the right of renewal of their license.

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#### IV.

THAT SAID ORDER OF DENIAL IS CONTRARY TO LAW, FOR THE REASON THAT THE COURT DID NOT HAVE THE POWER OR JURISDICTION TO INTERPRET SUCH LAW CONTRARY TO THE SPECIFIC PROVISIONS THEREOF AND IN EFFECT ADD CONDITIONS NOT IMPOSED UPON APPLICANTS BY SUCH LAW.

As set forth above, the legislature for the Territory of Alaska has not set any date for the filing of renewal applications and the law is silent upon this

point. Therefore, by "filling the vacuum" (R. 43) the trial Court here exceeded its power by interpreting such law contrary to the specific provisions thereof and by adding a condition not imposed by such law.

The theory upon which the Court proceeded was that the license held and that applied for were strictly "privileges" without other rights. Such is not correct.

The Court, in the cited Bordenelli opinion, states that a liquor license is not property or property right, but appellants contend that such is no longer necessarily so, however. Incident to that privilege is the privilege of renewal. Under Section 35-4-13, ACLA 1949, liquor licenses are transferable and under many recent decisions partake of the nature of property as well as privilege, particularly in the case of renewals. Section 35-4-13 reads in part as follows:

"... No license issued under the provisions of this Act shall be transferred except after first securing the consent of the Court ..."

The case of *Rowe v. Colpoys*, (137 F. 2d 249 (1943), 148 A.L.R. 488, at page 491), discussing the incidents of a license "privilege" in connection with a liquor license involved in bankruptcy proceedings, stated:

"The rule that intangible or incorporeal interests should not be subject to the process of *fiery facias* was applied in the case of such licenses as those of lawyers or physicians to practice their professions and in the case of corporate franchises . . . In the first case, issuance of the license is based upon qualities of personal probity

and professional skill which require the most careful individual scrutiny and forbid transfer under any circumstances.”

There the Court was making a distinction between types of license which could be transferred and those which could not. There is an extensive annotation to such case, part of which appears on page 492, as follows:

“The different connection in which the nature of the right conferred by a license to sell intoxicating liquors has been the subject of consideration by the Courts have given rise to a variety of characterizations which, generally speaking, group around the two basic conceptions of ‘personal privilege’ and ‘property’. This difference of opinion as to the legal nature of a liquor license is apparently due to the fact, not always recognized by the Courts, that such license, . . . nevertheless, constitutes a definite economic asset of monetary value for its owner. . . . It is submitted that wherever the legislature has made licenses assignable or transferable, and the transfer can be effected with the consent of the authorities to anyone qualifying under the statute the property element in the license is sufficiently recognized. . . .

“Where statute, providing for issuance of license to sell alcoholic beverages also provided for transfer and assignment of such license, the license was a ‘property right’ subject to levy. . . .

“But, whether it is a right, the transfer of which is controllable by a Court or by some other authority, it is, nevertheless, a valuable right, with

attributes of property and transferable value in the market of alcoholic beverage distribution. No good reason, either of procedure or policy, has been urged and none is apparent, for exempting this form of property right. . . .”

A definition is found in Words and Phrases, at page 475, as follows:

“A ‘license’ is not ‘property’ in the strict sense of the term but it confers valuable rights for which money was paid. *City of Carbondale v. Wade*, 106 Ill. App. 654.”

In the case of *State v. Corron*, 62 A. 1044, 1053, 73 N.H. 434, 6 Ann. Cas. 486, at page 1053 (Atl.), the Court there commented:

“Though a liquor ‘license’ is technically not ‘property’ in the sense that it can be taken away by the state without compensation, yet, under the statute it is a valuable right and possesses all other characteristics of property. It cannot be obtained except upon payment of the price, or fee, in cash. . . . It can be taken from the licensee during the year, except for his breach of the conditions upon which it was issued, only by legislative action. Except for the latter possibility, the license is property.”

An illustration of the application of these general principles is found in an Arizona case entitled *Oldaker v. Moore et al., State Tax Commission* (Ariz. 1936) 57 P. 2d 1225, where an applicant for a liquor license brought mandamus proceedings to compel the State Tax Commission to issue him a license. The Arizona law provided that no license should be issued

for premises within three hundred feet of a school building, and the Tax Commission, in denying applicant's license for premises near a theatre in which children often congregated relied upon other provisions of the Arizona statutes giving the Commission certain discretionary powers in matters of licensing. The Court, in granting the Writ of Mandamus, stated:

“We have come to the conclusion that, the tax commission having found that the applicant possesses the qualifications made essential under the statute for the issuance to him of a license, and it appearing the premises in which the business is proposed to be conducted is more than 300 feet from a public or parochial school, it was the plain legal duty of the commission, upon the tender of the license fee, to issue the license to plaintiff.

“If it is thought that dispensing of liquors should not be allowed near theatres and other places where children congregate or visit, the appeal is to the legislature and not to the courts.”

—*Oldaker v. Moore et al., State Tax Commission* (Arizona, 1936), 57 P. 2d 1225.

In the *Hathaway* case, the Supreme Court of Florida adopted the same view adhered to by the Arizona Court. In the *Hathaway* case, the plaintiff sought by mandamus to compel the issuance of a license, and upon the facts in that case, the Supreme Court of the State of Florida stated:

“Administrative agencies, when empowered to do so, may make and enforce regulations to carry



out powers definitely conferred on them, but they are not permitted to do more. The legislature cannot clothe them with more, neither may they assume to do more.”

—*Hathaway v. Smith* (Fla. 1948) 35 S. 2d 650 at page 652.

The late Judge Anthony Dimond had occasion to consider what he deemed to be inadequate language in the Territorial Liquor Code covering applications outside of an incorporated city. In reviewing the facts and issues involved in that case, he stated:

“It is notable that with respect to applications for places outside of incorporated cities no showing is required in the application or otherwise, ‘as to the integrity of the applicant and the desirability of the issuing of a license for the premises mentioned.’ Apparently, all that is necessary is that such an application be in compliance with the law and a majority of the local residents. . . . That the court must exercise lawful and sound, and not arbitrary, discretion in granting or refusing licenses. . . . At any rate, it is obvious that in all cases the provisions of law must control. . . .

“While not necessary to the decision in this case and no opinion is expressed upon the question, the power of the legislature to make the decision of the District Court final in this, or any other case of judicial cognizance is open to question. . . .”

—*Alaska Labor Trades Assn., Inc.*, 10 Alaska at page 472, at page 484.

The Supreme Court of Indiana, in discussing the fundamental principle that Courts cannot impose conditions which are not expressed in the statute, stated in the following language:

“ ‘The Courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a co-ordinate branch of the government. *It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however, desirable they may be,* than for judicial tribunals to transcend the just limits of their constitutional powers’. State v. Street R. Co., 146 Mo. 155, 47 S.W. 959; Peoples v. City of Valpariso, 100 N.E. 70.” (Emphasis supplied.)

The trial Court, in denying applicant’s application repeatedly stated (R. 34, R. 43, R. 45, R. 50), because of the assumed uncertainty and deficiency of the territorial statute, that the Court would in effect have to act as legislature and judge to determine the meaning of the territorial liquor statutes as applicable to this proceeding. Certainly the trial Court’s decision, being based at least partly upon such an approach, violates the basic principles outlined in the above cited cases. For cases adhering to rules similar to those in the cited cases and contrary to the opinion of the trial Court see *Alcoholic Bev. Control Bd. v. Pebbleford Distillers* (Ky. 1946) 193 S.W. 2d 1019, *Ex parte Sikes*, 24 L.R.A. 774, *People v. State Racing Commission*, 105 N.Y. Supp. 528.

As the foregoing cases reveal, power to license, in the absence of express statutory authority, does not include the power of prohibition. Neither does that power permit arbitrary and unreasonable exercise of discretion, even if discretion is delegated by statute. Undoubtedly, many cases can be found and probably many will be cited supporting denial of licenses upon the theory of privilege, but the decision of the Court in this case must stand upon statutory provisions which prescribe the requirements which must be met by the applicants.

In the present case, if territorial laws relating to "renewal" of liquor licenses are by the Court deemed deficient, such deficiency must be corrected by the legislature. Since the statutes are silent, the Court cannot assume a legislative function by adding to the code provisions governing the time of filing applications. The trial Court in this proceeding, has attempted in principle, to act, as the Arizona Tax Commission did, beyond the scope of the express provisions of the statute.

Appellants urge that the trial Court, upon the authorities hereinabove cited, erred in denying their application. The decision is tantamount to judicial legislation, in that it supplied, and construed into the statutory provisions, that which was considered missing. This, the Court had no power to do, and its decision, therefore, violates the basic principles applicable to this proceeding.

**CONCLUSION.**

Upon the applicable statutes cited and the record, together with the general rules of law governing the application of such law to the record herein, the appellants urge that the trial Court erred in its decision and that the same should be reversed, with directions that the application of appellants for the license applied for should be allowed.

Dated, Anchorage, Alaska,  
January 22, 1955.

Respectfully submitted,

E. L. ARNELL,

*Attorney for Appellants.*

**No. 14,500**  
**United States Court of Appeals**  
**For the Ninth Circuit**

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In the Matter of the Application of  
L. B. & W. 4217; and the Applica-  
tion of JONES, WILSON and ERVIN,  
d/b/a "The Club," for Beverage  
Dispensary License.

**On Appeal from the District Court for the  
District of Alaska, Third Division.**

**BRIEF FOR APPELLEE.**

---

**WILLIAM T. PLUMMER,**  
United States Attorney,

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**FILED**

**MAY 11 1955**

**PAUL P. O'BRIEN, CLERK**



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# **United States Court of Appeals For the Ninth Circuit**

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In the Matter of the Application of  
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Dispensary License.

**On Appeal from the District Court for the  
District of Alaska, Third Division.**

## **BRIEF FOR APPELLEE.**

---

### **JURISDICTION.**

The jurisdictional statement regarding the jurisdiction of the District Court as set forth by appellants is correct.

However, under Section 35-4-13, Alaska Compiled Laws Annotated, 1949, as amended by Chapter 131, Session Laws of Alaska, 1953, the decision of the District Court on hearings on applications for liquor licenses is made final and no appeal is permitted. By Section 292, 48 United States Code Annotated, 48 Stat. 583, it is provided in part as follows:

"No spirituous or intoxicating liquors shall be manufactured or sold in the Territory of Alaska,

except under such regulations and restrictions as the Territorial Legislature shall prescribe, and the legislative power and authority conferred upon the Legislative Assembly of the Territory of Alaska by sections 21-24, 44, 45, 67-73, 79-90, and 145 of this title, shall be, and is, extended to include any legislation pertaining to the manufacture or sale of spirituous or intoxicating liquor within the said Territory, and any provision contained in the said sections, in conflict herewith, is expressly repealed: . . .”

Therefore, appellee moves to dismiss this appeal for the reason that the United States Court of Appeals for the Ninth Circuit does not have jurisdiction in this matter.

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### **STATEMENT OF THE CASE.**

The statement of the case as set forth by appellants is substantially correct.

---

### **STATEMENT OF POINTS RELIED ON.**

#### **I.**

The trial Court did not err in finding the necessity for interpreting nor in its ultimate interpretation of the territorial statutes providing for renewal of existing liquor licenses.

#### **II.**

The Court did not err in holding that the mistaken advice given by an employee of the office of the Clerk

of the Court did not preclude the Court from asserting a correct position based on the law.

---

## ARGUMENT.

### I.

**THE TRIAL COURT DID NOT ERR IN FINDING THE NECESSITY FOR INTERPRETING NOR IN ITS ULTIMATE INTERPRETATION OF THE TERRITORIAL STATUTES PROVIDING FOR RENEWAL OF EXISTING LIQUOR LICENSES.**

Section 35-4-13 Alaska Compiled Laws Annotated, 1949, as amended by Chapter 131 Sessions Laws of Alaska, 1953, permits the renewal of existing liquor licenses without requiring the applicant for renewal to secure the written consent of a specified number of citizens within a certain area of the applicant's place of business, as is required of persons applying for liquor licenses for the first time. Section 35-4-15 Alaska Compiled Laws Annotated, as amended by Chapter 82, Session Laws of Alaska, 1949, and by Chapter 116, Session Laws of Alaska, 1953, permits those already having liquor licenses for premises within an otherwise proscribed area of schools and churches to continue in business in such areas. Prior to 1953, no limitation was placed on the issuance of licenses near schools or churches outside incorporated towns, so that the amendment affected by Chapter 116, Session Laws of Alaska, 1953, represents a legislative policy of restricting sales of intoxicating liquor in these areas.

In no instance do the statutes pertaining to intoxicating liquor specify a date upon which existing li-

censes must be renewed, and the District Court, in this case and that of *United States of America v. Tony Bordenelli and Eyvohn Bordenelli*, LBW 4004, held that, in order for the applicants to avail themselves of these "grandfather clause" provisos, the renewal application must be filed before the expiration of the existing license. Had the legislature specified a date upon which renewal applications must be made, there would have been no statutory ambiguity and no occasion for the trial Court to construe the statutes in this respect. Since this was not the case, however, the trial court properly felt and performed the duty of discovering the legislative intent on this matter.

In doing this, the trial Court correctly sought to ascertain the intention of the legislature in enacting the legislation in question. As stated in *In re National Guard*, 71 Vt. 493, 45 At. 1051, at page 1053:

"A statute is to be construed with reference to its manifest object . . ."

The Court considered the problem with regard to the social problem which the legislature necessarily addressed itself, to the evils which existed and which the legislature endeavored to correct.

It is patent that liquor legislation generally is aimed at controlling the evils inherent in the liquor traffic. The following statement found in 48 CJS, *Intoxicating Liquors*, Section 99 at page 223, compactly summarizes the manner in which licenses to engage in such traffic is regarded:

"A liquor license is a temporary permit or privilege, issued in the exercise of the police power of

a state, to engage in a specified liquor business which would otherwise be unlawful. It is a matter of privilege rather than of right, personal to the licensee, and is neither a right of property nor a contract or contract right in the legal or constitutional sense of those terms.”

Nor does the right of renewal of a liquor license stand on any higher plane. Like the privilege of obtaining an original license, the privilege of renewal is subject to the police power of the state. See *Cook v. Glazer's Wholesale Drug Co.*, 189 S.W. 2d 897, 209 Ark. 189.

In *Paron v. City of Shakopee*, 226 Minn. 222, 32 N.W. 2d 603 at page 608, the Court asserts:

“No person can acquire a vested right to continue, once licensed, in a business, trade, or occupation which is subject to legislative control and regulation under the police power.”

Since it must be conceded that the object of liquor control legislation generally is to promote and protect the public welfare, and since statutes are to be interpreted to effectuate the legislative objective, liquor laws are said to be remedial and therefore liberally interpreted to obtain this purpose. See Sutherland's Statutory Construction, Vol. 3, Section 7203, page 403. There the writer comments:

“Liquor control legislation, while incidentally intended in some cases to produce revenue, has as its primary aim the protection of public welfare by preserving health and eliminating intemperance and the undesirable social and moral effects commonly existing at the saloon. Al-

though a definite and unanimous jurisdictional policy has not yet been adopted by the courts in the interpretation of liquor laws, the prevailing and seemingly better tendency has been to give them a liberal interpretation to effectuate their purpose which is the avoidance of intemperance.”

A good example of this interpretative approach is found in the case of *Dougherty v. Kentucky Alcoholic Control Board*, 279 Ky. 262, 130 S.W. 2d 756, in which a statute forbidding the issuance of a license to a liquor establishment located within a said distance from, and on the “same street or avenue” as a church, was held to be applicable to a liquor establishment on the same highway in the country.

On this point, see also Sutherland’s Statutory Construction, Vol. 3, Section 7203 at pages 404 and 405, where it is stated:

“Legislation designating the requirements for licenses to manufacture and sell liquor have generally been applied with strictness to insure absolute compliance with the law.”

Where a statute is promotive of the public welfare, then, a liberal construction is applied to the general statute to effectuate its purposes, and a strict or narrow construction is applied to statutory specifications to the general statute.

The particular liquor legislation which is here in question prohibits the issuance of liquor licenses within one-quarter mile of church or school outside an incorporated town. By the very act of legislating on this subject, it must be clear that the legislature rec-



ognized an evil to combat. And, as stated by Judge Dimond in *Application of Wakefield*, 10 Alaska 599 at page 607, in discussing similar legislation applicable to incorporated towns:

“... as we must assume, the purpose of our own statute was to protect minor children.”

It is well established that, in the exercise of its police power, the legislature may deny the right to carry on liquor business in certain areas altogether. See:

*Bowling Green v. McMullen*, 134 Ky. 742, 122 S.W. 823;

*State ex rel. Saperstein v. Bass*, 177 Tenn. 609, 152 S.W. 2d 236;

*State ex rel. Dixie Inn Inc. v. Miami*, 156 Fla. 784, 24 S. 2d 705.

Moreover, it appears that those statutes prohibiting dealing in intoxicating liquor within specified distances of churches and certain public institutions which contain “grandfather” clauses have been liberally construed in favor of the churches and public institutions and strictly against the persons who wish to continue to do business within a specified area. In *Calvary Presbyterian Church v. State Liquor Authority*, 245 App. Div. 176, 281 N.Y.S. 81, page 85, the Court comments:

“Because of the many evils attendant upon traffic in liquor, it is subject to regulation by the state in the exercise of its police power. It is fundamental that regulations by way of exceptions in respect to churches and schools must be liberally construed in their favor, and strictly against ap-

plicants for licenses to sell liquor, wine and beer, within prescribed distances.”

In *State ex rel. Brown v. McCanless*, 184 Tenn. 83, 195 S.W. 2d 619 at page 621, it is said:

“This court, like many other courts, has often had occasion to call attention to the commonly known fact that the business of dealing in intoxicating liquor is subject to the most stringent regulations as to places where it is conducted if this traffic is to be at all kept in hand.”

For other authority strictly construing such legislation against renewal applicants and in favor of the parties and interests sought to be protected, see also:

*Appeal of Di Rocco*, 167 Pa. Super. 381, 74 At. 2d 501;

*People ex rel. Cairns v. Murray*, 148 N.Y. 171, 42 N.E. 584;

*People ex rel. Gentilesco v. Excise Board*, 7 Misc. 415, 27 N.Y.S. 983;

*Wright v. Board of Excise*, 75 NJL 28, 66 At. 1061;

*In re Place*, 27 App. Div., 561, 50 N.Y.S. 640;

*In re Lewis*, 26 Misc. 532, 57 N.Y.S. 676;

*Re Lyman*, 35 App. Div. 389, 54 N.Y.S. 294;

*People ex rel. Bagley v. Hamilton*, 25 App. Div. 428, 49 N.Y.S. 605.

It is submitted that the trial Court in seeking the intention of the legislature in enacting the statutes herein concerned, necessarily considered the question with reference to the problem of liquor regulation in

Alaska generally and in church and school localities particularly. The societal matrix was the basis of reference. After such consideration, the Court determined that to enjoy the privilege of renewal, a continuity in the existence of a valid license was requisite. Though this was, perhaps, a strict construction of the statutes, in the light of the foregoing authorities cited, it is a proper and reasonable one.

That the Court's interpretation of the word "renewal" is not a strained one is supported by the case of *Carter v. Brooklyn Life Insurance Company*, 17 N.E. 396, page 399, 110 N.Y. 15, page 22, in which the Court holds that:

"... to renew a note, a lease or a contract, it is not essential to wait until they have respectively expired; for, after that time, it would be practically impossible to renew them. A new note or lease may be made, or contract created, but they would have force and effect from the new creation, and not from the original agreement. To renew in its popular sense is to refresh, revive, or rehabilitate an expiring or declining subject; but it is not appropriate to describe the making of a new contract, or the creation of a new existence, . . ."

## II.

THE COURT DID NOT ERR IN HOLDING THAT THE MISTAKEN ADVICE GIVEN BY AN EMPLOYEE OF THE OFFICE OF THE CLERK OF THE COURT DID NOT PRECLUDE THE COURT FROM ASSERTING A CORRECT POSITION BASED ON THE LAW.

The duties and powers of the Clerk of the Court relating to liquor license are specifically set forth in the statutes. See Sections 35-4-12, 35-4-13 and 35-4-14 Alaska Compiled Laws Annotated, 1949, as amended. It is clear that insofar as the Clerk of the Court is concerned his powers are of a limited nature and certainly do not suggest that he is empowered to interpret the liquor laws. Appellants, in dealing with the public employee, were charged with constructive notice of the law regarding his authority and bound to ascertain the scope of such authority.

*Bennett v. Gray's Harbor County*, 130 Pac. 2d 1041, 15 Wash. 2d 331;

*City of Molalla v. Coover, et al.*, 235 Pac. 2d 142, 192 Ore. 233;

*Patten v. State Personnel Board*, 234 Pac. 2d 987, 106 C.A. 2d 168;

*Gontrum et al. v. Mayor & City Council of Baltimore*, 35 At. 2d 128, 182 Md. 370.

Apparent authority is insufficient to raise an estoppel in such cases. *State v. Davisson, et al.*, 280 S.W. 292.

The following cases illustrate that the public is not bound by the mistaken advice or opinions of public officers or employees:

*Fleming, Administrator of Wage and Hour Division, U. S. Dept. of Labor v. Miller, et al.*, 47 Fed. Supp. 1004, in which it was held that the administrator of the Wage and Hour Division was not "estopped" from bringing action to restrain violations of the Fair Labor Standards Act because the administrator's employee had informed defendants that their practices were not violative of the act.

*Commissioner of Internal Revenue v. Duckwitz*, 68 F. 2d 629, in which the Government was held not estopped to claim deficiency in income taxes because of a careless expression of opinion of an employee of the Bureau of Internal Revenue.

*Corning v. Town of Ontario*, 121 N.Y.S. 2d 288, 204 Misc. 38, a suit to restrain defendants from enforcing a zoning ordinance as applied to a house trailer. Before acquiring and moving a house trailer, the Town Clerk and Building Inspector advised plaintiffs that there were no restrictions on such use, when in fact the zoning ordinance prohibited it. It was held that the representation and advice in which plaintiffs relied did not bind the town so as to prevent it from enforcing the ordinance.

*State v. Northwest Magnesite Co.*, 182 Pac. 2d 643, 28 Wash. 2d 1, an action to recover additional royalties from the sale of minerals from public land leased to the plaintiff. It was held that an erroneous statement by the Commissioner of Public Lands, that the statute did not cover the lease in question, did not

preclude the state from asserting the true effect of the statutes. See also:

*Thirst Quenchers of Ohio Inc. v. Glander*, 68  
N.E. 2d 671;

*New Colonia Ice Company v. Woolley*; 41  
N.Y.S. 2d 662, 181 Misc. 473,

on this point.

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### CONCLUSION.

None of the matters complained of by appellants constitute error. The trial Court properly interpreted and applied the statutes in question, and the trial Court's decision should, therefore, be affirmed.

Dated, Anchorage, Alaska,  
April 26, 1955.

Respectfully submitted,

WILLIAM T. PLUMMER,  
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JAMES M. FITZGERALD,  
Assistant Attorney General,

*Attorneys for Appellee.*

**No. 14,500**

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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In the Matter of the Application of  
L. B. & W. 4217; and the Applica-  
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Dispensary License.

**On Appeal from the District Court for the  
District of Alaska, Third Division.**

**REPLY BRIEF FOR APPELLANTS.**

---

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**FILED**

**JUN - 3 1955**

**PAUL P. O'BRIEN, CLERK**





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---

The appellants by way of reply redirect the attention of Court and counsel to the wording of the controlling statute itself, Chapter 116, S.L.A., 1953. The appellants submit that argument has not been directed sufficiently to its precise wording.

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1. **THE APPELLANTS WERE ENTITLED TO REISSUE OF THEIR LICENSE UNDER AN EXCEPTION TO CHAPTER 116, S.L.A., 1953.**

Chapter 116, S.L.A., 1953, contains the following exceptions:

“\* \* \* provided, however, that a license may be reissued for the sale of intoxicating liquor in any building in which such sale was authorized by law at a time subsequent to March 23, 1949.  
\* \* \*”

This exception is clear and unambiguous. The appellants in every way come within its terms. Upon close examination, we see the exception contains the term “reissue” rather than the term “renew” which was loosely used by the parties as well as by the District Court. The position urged by the appellee and adopted by the District Court is that if there is no continuity there may be no “reissue” of a license or “renewal” as the appellees choose to call it. The term “reissue” does not imply continuity of licenses but rather indicates that a license ceased to be valid and it became necessary to “reissue” it.

There is no question but that all appellants were “authorized by law at a time subsequent to March 23, 1949”. They operated “The Club” until it was destroyed by fire in November of 1953. The validity of the licenses under which they operated has never been questioned.

Dated, Anchorage, Alaska,  
May 20, 1955.

Respectfully submitted,

E. L. ARNELL,

*Attorney for Appellants.*

**No. 14,500**

IN THE

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L. B. & W. 4217; and the Applica-  
tion of JONES, WILSON AND ERVIN,  
d/b/a "THE CLUB" for Beverage  
Dispensary License.

**BRIEF OF JOHN E. MANDERS,  
AMICUS CURIAE.**

---

**JOHN E. MANDERS,**

First National Bank Building, Anchorage, Alaska,

*Amicus Curiae.*

**FILED**

**DEC - 2 1955**

**PAUL P. O'BRIEN, CLERK**



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**BRIEF OF JOHN E. MANDERS,  
AMICUS CURIAE.**

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The permission of the Court granting leave to this *amicus curiae* to file this brief is appreciated.

The attempted delegation of power by the Territorial legislature to the Courts of the District of Alaska is nothing more or less than the child of a sterile mother.

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**THE QUESTION PRESENTED IN THIS BRIEF IS: INVALIDITY OF SECTIONS 35-4-11 TO 35-4-23, INCLUSIVE, ACLA 1949, AS AMENDED (ALASKA LIQUOR LAW), IN IMPOSING NON-JUDICIAL FUNCTIONS ON THE DISTRICT COURT FOR THE DISTRICT OF ALASKA.**

It is the position of *amicus curiae* that the District Court for the District of Alaska is without power or

authority to issue any liquor license pursuant to the Alaska Liquor Law, by reason of the fact that the Territorial legislature has, by enactment of the Alaska Liquor Law, imposed upon the District Court *ministerial or administrative functions and the same are non-judicial in nature.*

It is not amiss to call to the Court's attention certain relevant and material provisions of acts of Congress of the United States as well as acts of the Territory of Alaska Legislature.

Licenses to dispense liquor in the Territory of Alaska can only be issued by an order of the District Court or Judge thereof and not otherwise.

Sec. 35-4-12 ACLA 1949, provides:

“LICENSES: ISSUANCE: RECORD. The licenses provided for in this Act shall be issued by the Clerk of the District Court or any subdivision thereof in compliance with the order of the Court or Judge thereof duly made and entered; and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against the granting of licenses and of the action of the Court thereon.”

Title 48 U.S.C.A. section 24, provides:

“LIMITATIONS ON AUTHORITY TO ALTER, AMEND, MODIFY OR REPEAL EXISTING LAWS: OTHER OR ADDITIONAL TAXES OR LICENSES. The authority granted to the legislature by section 23 of this title (§2-1-1 herein) to alter, amend, modify, and

repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States or to the game-fish and fur seal laws and laws relating to furbearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to sections 41, 47, 161 to 169, and 322 to 325 of this chapter. This provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses.”

Section 4-2-5 ACLA 1949, provides:

“ACTS OF LEGISLATURE IN CONFLICT WITH CERTAIN FEDERAL ACTS VOID. Except as otherwise provided by law all acts and parts of acts passed by any Territorial legislature subsequent to July 30, 1886, in conflict with the provisions of sections 1473, 1475, 1478, and 1479 (§§ 4-2-5, 4-3-5, 12-1-1, 12-1-3 herein) of this title shall be null and void.”

Section 4-2-6 ACLA 1949, provides:

“PROHIBITION AGAINST LAWS IMPAIRING JURISDICTION OR AUTHORITY OF DISTRICT COURT JUDGES OR OFFICERS. The legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States. (48 U.S.C.A. §80.)”

By act of Congress a District Court has been established for the Territory of Alaska. It is vested with

the jurisdiction of District Courts of the United States and with general jurisdiction in civil, criminal, equity and admiralty cases. But it is not a District Court of the United States within the meaning of acts of Congress relating to such Courts. (54 Am. Jur., §339, p. 963.)

Section 4-2-7 ACLA 1949, provides:

“ENFORCEMENT OF LAWS BY COURTS: POWER OF LEGISLATURE TO IMPOSE ADDITIONAL DUTIES ON FEDERAL OFFICERS. Nothing in sections 21 to 24, 44, 45, 67 to 73, 74 to 90 of this title shall be so construed as to prevent the courts of Alaska from enforcing within their respective jurisdictions all laws passed by the legislature *within the power conferred upon it*, the same as if such laws were passed by Congress, nor to prevent the legislature passing laws imposing additional duties, not inconsistent with the present duties of their respective offices, upon the governor, marshals, deputy marshals, clerks of the district courts, and United States commissioners acting as justices of the peace, judges of probate courts, recorders and coroners, and providing the necessary expenses of performing such duties. (48 USC §91.)” (Italics ours.)

No mention is made in the above section of District Courts or Judges thereof.

Section 4-2-9 ACLA 1949, provides:

“RATIFICATION OF ACTS OF FIRST LEGISLATURE IMPOSING DUTIES ON FEDERAL OFFICERS. All acts of the First Legislature of the Territory of Alaska, contained

in Alaska Session Laws of 1913, imposing additional duties upon the Governor, Secretary of the Territory, United States Marshals, Deputy United States Marshals, Clerks of the Courts, United States Commissioners, United States District Attorneys, and other officers, be, and the same hereby are, ratified and confirmed in all particulars except as the same may have been amended by Acts of the present and Second Session of Alaska Legislature.”

No mention is made in the above section of District Courts or Judges thereof.

As set forth in Section 35-4-12, ACLA, 1949, as amended, the only authority for the Clerk of the District Court to issue a liquor license is upon the *order of the Court or judge* duly made and entered. The Clerk has no authority to issue any licenses *except upon such order*. *It is the Court alone or Judge* who determines whether a liquor license shall or shall not be issued by the Clerk. (Italics ours.)

Congress has not delegated to the Territorial legislature the power to impose duties on the Court which are not of a judicial nature, and not having so delegated its (Congress') power to the Territorial legislature to impose such duties, from what source did the legislature obtain authority imposing such duties? WHEN DID THE AGENT (TERRITORIAL LEGISLATURE OF ALASKA) CREATED BY CONGRESS HAVE GREATER POWER THAN ITS PRINCIPAL (CONGRESS OF THE UNITED STATES), ITS CREATOR?

**THE FORM AND NATURE OF TERRITORIAL GOVERNMENT AND  
DIVISION OF POWERS IS SET FORTH IN 62 C. J. 797, §17.**

“No special form of government is necessarily a feature of an organized territory, and the determination as to the form of the government to be established in any particular territory is within the discretion of congress. As a general rule the governments which have been established have been representative, at least in respect of the legislative body, and have consisted of the three departments, executive, legislative, and judicial, generally recognized as typical of the American system of government. Rules as to the distribution of powers among the three departments of government, and as to the independence of each, similar to those applicable to the federal and state governments, have been recognized or applied where the operation of the government of the territories has been involved even though the organic act contains no general distribution clause. Thus, while the three departments are interdependent, in the sense that each is unable to perform its functions fully and adequately without the others, in the main each department is independent and not subject to the direct control of another; the powers of the several departments are separate and distinct, and neither department may encroach on another in respect of the latter's exercise of powers duly conferred, as, for example, by an attempt to exercise any of the powers conferred by the organic act on either of the others even though the organic act contains no explicit prohibition in this regard. Courts will, so far as is within their power, protect each of the departments from encroachment. The question as to which department has power in a

particular matter depends in general on the provisions of the organic law. Functions of each department may be exercised only in the manner prescribed by applicable acts of Congress or by laws of the local legislative body in conformity with such acts of Congress.”

In the famous case of *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 72 Law. Ed. 845, at page 849, Mr. Justice Sutherland, in delivering the opinion of the Court stated:

“Thus the Organic Act, following the rule established by the American constitutions, both state and Federal, divides the government into three separate departments—the legislative, executive and judicial. Some of our state constitutions expressly provide in one form or another that the legislative, executive and judicial powers of the governments shall be forever separate and distinct from each other. Other constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. See *Kilbourn v. Thompson*, 103 U.S. 168, 190, 191, 26 L.ed. 377, 386, 387. And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism. That the principle is implicit in the Philippine Organic Act does not admit of doubt. See *Abueva v. Wood*, 45 Philippine, 612, 622, 628 et seq.

“It may be stated then, as a general rule inherent in the American constitutional system,

that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the general inviolate character of this basic rule."

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**GOVERNMENT OF TERRITORIES—54 AM. JUR. §28, pp. 542, 543.**

"\* \* \* The Constitution confers on Congress the power to govern and control territory owned by the United States and to make regulations in regard thereto. In reference to territories Congress occupies a dual position, one as Congress of the United States, limited by the Constitution, and the other as a local legislature to which many constitutional limitations on Congress do not apply; it may in general do for the territories what the people, under the Constitution of the United States, may do for the state. The term 'regulations' as used in Article 4, § 3, is construed as meaning 'laws'. The term 'territory' as used in this connection is merely descriptive of one kind of property, and is equivalent to the word 'lands'. And Congress has the same power over it as any other property belonging to the United States; and this power is vested in Congress without limitation, and has been consid-



ered the foundation upon which the territorial governments rest. \* \* \*”

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**POWER OF FEDERAL GOVERNMENT OVER TERRITORIES—**

49 AM. JUR., §113, p. 326.

“The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself. In the fullest sense the United States possess sovereignty over the territories of the United States so long as they exist under territorial government. The convention which framed the Constitution of the United States, in view of the territory already possessed and the possibility of acquiring more, inserted in that instrument in Art. 4, §3, a grant of express power to Congress ‘to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.’ Whether the provisions of a particular act are applicable to a given territory depends upon the character and aim of the act.

“In reference to the territories, Congress occupies a dual position, one as the Congress of the United States limited by the Constitution, and the other as a local legislature to which many

of the constitutional limitations on Congress do not apply. The territories are merely political subdivisions of the outlying dominion of the United States. They bear much the same relation to the general government that counties do to the states, and Congress may legislate for them as states do for their respective municipal organizations. The organic law of a territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

“Territory when acquired by treaty becomes the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations may see fit to accept relating to the rights of the people then inhabiting that territory. Having rightfully acquired the territory, the United States Government is the only one which can impose laws on it, and its sovereignty over it is complete.”

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**ORGANIZATIONS AND OPERATION OF TERRITORY SOLELY IN THE HANDS OF CONGRESS—49 AM. JUR., §127, p. 336.**

“The organization of a territory is solely in the hands of Congress. It may determine the form of the local government in a particular territory as well as the qualifications of the officers

who shall administer it. In ordaining government for the territories and the people who inhabit them, all the discretion which belongs to the legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law from time to time the form of the local government in a particular territory and the qualifications of those who shall administer it. The form of government for the territories which Congress shall establish is not prescribed, and need not necessarily be the same in all territories. The form generally adopted is that of a quasi-state government, with executive, legislative, and judicial officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to that form."

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#### **VESTING DISCRETIONARY POWER IN JUDICIARY—**

11 AM. JUR., §228, p. 942.

"There are certain apparent exceptions to the general rule forbidding the delegation of legislative authority to the courts in cases where discretion is conferred upon the courts. It is clear, however, that when the courts are said to exercise a discretion, it must be a mere legal discretion which is exercised in discerning the course prescribed by law, and which, when discerned, it is the duty of the court to follow. In such instances, the exercise of judicial discretion by the courts is not an attempt to use legislative power or to prescribe and create a law, but is an instance of the administration of justice and the application of existing laws to the facts of par-

ticular cases. Thus, the principle as to the separation of powers of government is not transgressed by vesting in the courts discretion as to the granting of licenses or the length of sentence or amount of fine between designated limits in sentencing persons convicted of a crime. \* \* \*"

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#### LEGISLATIVE INTERFERENCE WITH JUDICIARY—

11 AM. JUR., §206, p. 908.

"The legislature cannot ordinarily diminish, enlarge, or interfere with the jurisdiction of a court as defined by the Constitution. It may, however, create courts not mentioned in the Constitution, but it may not confer upon them powers which could not have been conferred upon the courts already existing.

"The rule is well settled that the judicial power cannot be taken away by legislative action. Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional. The legislature is therefore not permitted to interfere with the courts in the performance of their duties, as, for example, by declaring the forfeiture of the salary of a judge for a failure to perform his duties. It has no power to direct the judiciary in the interpretation of existing statutes. It cannot by statute interfere with the power vested in the courts by the state Constitution to issue writs of mandamus to enforce the performance of an official duty. Similarly, a statute forbidding the courts to direct a verdict is unconstitutional as invalidly attempting to limit the constitutional powers vested in the judiciary.

“The general rule is subject to some modification. The fact that the courts have all the inherent and implied powers necessary to function properly and effectively does not mean that they are wholly independent of the legislature, which may put reasonable restrictions upon constitutional functions of the courts, provided that such restrictions do not defeat or materially impair the exercise of those functions. Thus, the legislature may, within proper bounds, prescribe rules of practice and procedure for the exercise of jurisdiction. Moreover, the suspension of a possessory remedy is not an impairment of the constitutional jurisdiction of a court.

“Legislative interference with the courts by attempting to delegate to them legislative powers or confer upon them nonjudicial functions is elsewhere considered.”

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#### DELEGATION TO, OR CONFERRING LEGISLATIVE POWER UPON, JUDICIARY—11 AM. JUR., §225 p. 937.

“One important application of the principle as to the separation of governmental powers and their allotment to the three departments of government consists in the rule prohibiting the vesting of legislative power in the judiciary. The legislature cannot delegate or confer legislative power on the courts or impose legislative duties upon them, because such duties are not judicial in nature. Well settled as is the general rule, there is a wide variance of conclusions in those cases in which it has been sought to be

applied. Not only do the constitutional provisions vary as to the powers which may be imposed upon the courts or which may be delegated to them in the different states, but the courts themselves have taken inconsistent positions on the questions of what constitutes legislative power and what constitutes judicial function. Those cases dealing with laws attempting to vest in the courts a power of appointment graphically illustrate the diversity of views existent. It has usually been held that where a statute attempts to vest powers in the judiciary to appoint to office certain administrative or subordinate officers, or officers who assist in carrying out court functions, no invalid delegation of legislative authority to the judiciary has been made and there is no usurpation of legislative power by the court. In other cases it has been held that statutes imposing the power of appointment on judges are invalid as attempting to impose upon the courts a nonjudicial function. These cases generally involved the attempted appointment of such officers as waterworks trustees, surveyors, and other officers whose duties were solely ministerial and not connected with the exercise of judicial functions.”

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**DISTRIBUTION OF POWERS OF GOVERNMENT—AS BETWEEN THE SEVERAL DEPARTMENTS—11 AM. JUR., §180, p. 876.**

“One of the fundamental principles of the American Constitutional system is that the governmental powers are divided among the three departments of government, the legislative, execu-

tive and judicial, and that each of these is separate from the others. The principle as to the separation of the powers of governmental operates in a broad manner to confine legislative powers to the legislature, executive powers to the executive department, and those which are judicial in character to the judiciary. It has been said that the object of the Federal Constitution was to establish three great departments of government: The legislative, the executive, and the judicial departments. The first was to pass the laws, the second, to approve and execute them, and the third, to expound and enforce them.”

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#### **IMPOSING NONJUDICIAL FUNCTIONS ON COURTS—**

14 AM. JUR., §20, p. 258.

“One application of the general principle as to the separation of the powers of government is the rule which has itself been described by some authorities as a rudimentary principle of constitutional law—namely, that on judges as such no functions can be imposed except those of a judicial nature. It has been said that the policy and intent of the constitutional system is that the courts and judges not only shall not be required, but shall not be permitted, to exercise any power or to perform any trust or to assume any duty not pertaining to, or connected with, the administering of the judicial function, and that the exercise of any power or trust or the assumption of any public duty other than such as pertains to the exercise of the judicial function is not only without constitutional warrant, but is against the

constitutional mandate in respect of the powers they are to exercise and the character of the duties they are to discharge. Under these principles, functions which are essentially executive and administrative in character cannot be delegated to the judiciary. An act of the legislature delegating executive or legislative powers to courts has been viewed as unconstitutional.

“The full force of this principle denying the right of the legislature to impose nonjudicial functions on the courts is not recognized in many jurisdictions. In many states nonjudicial administrative duties have been continually placed upon the judges, and the power of the legislature to do this has been upheld. According to some authorities, municipal or police courts are not repositories of the judicial power referred to in the Constitution, and the legislature has therefore the right to impose upon the judge of such a court powers and duties of a nonjudicial character. Where a Constitution has placed in the legislature the power to regulate the mode of appointing officers not otherwise provided for, the authority of the legislature to confer upon judges and courts the power to appoint inferior officers whose duties have no connection with the functions of courts has frequently been recognized.”

In *City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. 781 (Ohio), at page 782, it is stated:

“\* \* \* It is a sound proposition that the distribution of the powers of the state by the constitution to the legislative, executive and judicial departments, operates, by implication, as an inhibition against the imposition upon either of those powers



which strictly belong to one of the other departments. \* \* \*

Although not expressly provided for in the Organic Act of Alaska, the doctrine of separation of powers is implicit in the organization of governmental powers into the three traditional departments. If the doctrine is accorded full recognition, the territorial legislature is inhibited from conferring a nonjudicial function on the District Court of Alaska or the judges thereof. This must be so pursuant to the provisions of 48 USCA 91, which provides:

“Nothing in sections 21-24, 44, 45, 67-73, 74-90 and 145 of this title shall be so construed as to prevent \* \* \* the legislature passing laws imposing additional duties, not inconsistent with the present duties of their respective offices, upon the governor, marshals, deputy marshals, clerks of the district courts, and United States Commissions \* \* \*

Again it is to be noted that courts, or the judges thereof, are not mentioned in that act.

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#### CIVIL GOVERNMENT OF ALASKA.

It is the wish of *amicus curiae* to call to the Court's attention the language as to the civilian government of Alaska, as set forth in the case of

*Abbate v. United States*, 270 F. 735 at page 738:

“The territory ceded to the United States by Russia by the Treaty of March 30, 1867, 15 Stat. 539, remained until 1884 unorganized, subject to

provisions of Act July 27, 1868, c 273, 15 Stat. 240, and subsequent acts, most of which were incorporated into R.S. §§ 1954-1976. It was constituted a civil and judicial district, and a civil government therefor was established by Act May 17, 1884, c 53, 23 Stat. 24, which provided for a Governor and other officers and for a District Court for said district. A Criminal Code and Code of Criminal Procedure for the district were enacted by Act March 3, 1899, c. 429, 30 Stat. 1253. Further provisions for a civil government, including a Code of Civil Procedure and a Civil Code were made by the Carter Act of June 6, 1900, c. 786, 31 Stat. 321. And it was constituted the territory of Alaska, and further provisions for its government, including the creation of a legislative assembly, were made by Act Aug. 24, 1912, c. 387, 37 Stat. 512 (U.S. Comp. Stats. § 3528 et seq.). Section 3530 of those Statutes, relating to the territory of Alaska, is as follows:

‘The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature,’

with certain exceptions and provisions not applicable to the present case.”

## NON-JUDICIAL FUNCTIONS.

In *Norwalk Street R. Co.'s Appeal*, 69 Conn. 576, 39 L.R.A. 794, quoting from the syllabus:

“The incapacity of the legislature to execute a power which is essentially and merely a judicial power, and of the judiciary to execute a power which is essentially and merely a legislative power, as well as the limitation of the meaning of legislative power by force of certain primary principles of government fairly embodied in the Constitution, and by the necessities involved in the separation and independence of distinct departments of government, is fundamental to the very existence of constitutional government as established in the United States.

“A superior court or judge thereof cannot validly exercise a power which is not ‘a judicial power’ within the meaning of the Constitution.

“An original application to a superior court or judge thereof for the approval and adoption or modification of a plan for the location and construction of a street railway, including the determination of the streets to be occupied and the location as to grade and center line of the street, as well as changes to be made in the street or kind and quality of track to be used, the motive power and method of applying it, does not call for the exercise of a judicial power within the meaning of the Constitution, although the application is called an appeal and is made after the refusal or neglect of local authorities to give notice of their decision on the plan within sixty days after it is presented to them; and this is by statute deemed to be a refusal on their part to approve and accept the plan.”

And further, in that case, it is said at page 799:

“\* \* \* The Supreme Court of the United States has uniformly held that a law conferring on the courts a power which is not a judicial power within the meaning of the Constitution, is unconstitutional, and that such power cannot be lawfully exercised by the courts.”

And further, in the case of *Wayman v. Southard*, 23 U.S. 10, 6 L. ed. 253 at 263, the Great Chief Justice is quoted as stating:

“The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law.”

In the case of *McCrea v. Roberts*, Judge (Md.) 43 A. 39, quoting the syllabus:

“Mandamus does not lie to compel a circuit judge to grant an application for a liquor license, where he, after a hearing on the merits, has dismissed the application, though the dismissal was erroneous, since the writ is not awarded to control the discretion of courts acting within their jurisdiction, or to reverse a decision when made.

“Acts 1894, c. 6, § 7, providing that, where objections are filed to an application for a liquor license in Carroll county, both the application and objections shall be referred to the circuit judge, who shall, on notice, determine whether the license applied for shall be issued or not, imposes a judicial duty on the circuit judge, and hence is not repugnant to Bill of Rights, art. 8, providing that the legislative, executive and judicial powers of the government shall forever be separate and dis-

tinct and that no person exercising the functions of one of said departments shall discharge the duties of any other, and article 33, providing that no judge shall hold any other office or political trust.”

The distinction between this case and the situation in the Territory of Alaska is that in this case the Clerk could have issued the license in the first instance unless a protest or remonstrance was filed. *In Alaska the Clerk is not vested with any authority to issue a license except when the Court or Judge enters an order for the issuance of such license.*

In *Cromwell v. Jackson* (Md.) 52 A. 2d 79, quoting from the syllabus:

“Intoxicating liquors:

The sale of alcoholic beverages is a privilege and not a right.

Licenses to sell alcoholic beverages are not regarded as property or as conferring any property rights.

The state can control, regulate and prohibit the sale of intoxicating beverages, and licenses for sale of liquor are granted by state in exercise of its police power.

License for sale of alcoholic beverages is a permit granted or withheld at the pleasure of the state and at any time the state may annul or modify or prescribe its conditions.

The legislature has the power to limit the number of licenses for sale of alcoholic beverages and the location of establishments where such beverages may be sold.

In construing a statute all presumptions are in favor of the act and it should not be stricken down as void unless it plainly violates a constitutional provision.

A reasonable doubt in favor of a statute is sufficient to sustain it.

Courts can be warranted only in a clear case in declaring an act unconstitutional.

Where Court of Appeals is of opinion that legislature has exceeded its authority in placing non-judicial function on court, Court of Appeals will not hesitate in declaring the act void.

Statute authorizing judges of Circuit Court for Allegany County to approve license for sale of alcoholic beverages if court is of opinion that applicant is fit person or place proper one with reference to public peace and general welfare of neighborhood or to character of inhabitants, due regard being given to number of licenses issued for neighborhood, as well as all specific restrictions and conditions set forth in act, imposes duties on judges which are quasi-legislative and non-judicial and therefore statute as a whole is unconstitutional, notwithstanding the severability clause. Pub. Loc. Laws 1930, art. 1 §§ 301, 301A, 301B, 304, 305 as added by Laws 1933, Sp. Sess. c. 5; Declaration of Rights, art. 8.

Where statute was unconstitutional, clause thereof repealing prior law was void.

The old saloon law for Allegany County and amendments thereto were so repugnant to and inconsistent with the new statewide Alcoholic Beverages Act that the old saloon law and amendments thereto were repealed by the new act. Laws

1894, c. 140; Code Supp. 1943, art. 2B, § 3, subds. 1(a), 2(a), § 5, subd. F, § 6, subds. E, F.”

This case is extremely instructive. However, the case comprises 16 pages and would be too long to quote at length. However, all of the various cases which have arisen in Maryland on the question of non-judicial functions are set forth and the distinctive features of each case gone into, including the case of *McCrea v. Roberts*; *Close v. Southern Maryland Agr. Association*; *Appeal of Norwalk Street R. Co.*, *supra*.

In the case of *Close v. Southern Maryland Agricultural Ass'n*, 108 A. 209, quoting from the syllabus:

“Appeal from an order of the circuit court granting an agricultural association a license to make and permit betting, pool selling, and bookmaking on the result of horse races on its grounds pursuant to Code (vol. 3) art. 27, §§ 218-221, held not open to dismissal as involving only a moot question after expiration of the time for which the license was issued.

“If action of circuit court, in granting agricultural association license to make and permit betting, pool selling, and bookmaking on the result of horse races, was prohibited by Declaration of Rights, art. 8, because not a judicial act, the circuit court had no jurisdiction to grant the license, and the Court of Appeals can entertain an appeal from its action, having jurisdiction to review the circuit court acting without jurisdiction either on appeal, writ of error, or of its own motion, even though the question of jurisdiction was not raised

below, as Code, art. 5 § 9, does not apply to such question.

“Under Declaration of Rights, art. 8, it is not left to the discretion of judicial officers whether they will or will not perform non-judicial duties, but they are not permitted to do so.

“Code (vol. 3) art. 27, §§ 218-221, authorizing the licensing of betting and bookmaking at and on horse races within the grounds of an agricultural association, etc., on license by the circuit court, held violative of Declaration of Rights, art. 8, as involving the exercise of non-judicial functions, ministerial and legislative, by the circuit court, particularly in view of section 217.”

Judge Jones in the case of *Board of Superintendents, etc. v. Todd*, 54 A. 963, at page 964 stated:

“ ‘The inquiry as to this is whether it is within the constitutional power of the Legislature to impose upon the judiciary or invest them with, a function of his character, and whether the judiciary in the attempt to discharge such a function are not acting without constitutional warrant.’

“He referred to the case of *State v. Chase*, 5 Har. & J. 297, where Judge Buchanan said:

“ ‘New judicial duties may often be unnecessarily imposed, and services, not of a judicial nature, may sometimes be required. In the latter case, a judge is under no legal obligation to perform them’—to which Judge Jones added, ‘which was to say that the opinion of the court was that duties, “not of a judicial nature,” could not legally and constitutionally be imposed upon the courts or the judges.’



“After referring to the fact that in the Constitutions of 1851, 1864, and 1867 there had been added to the provisions of the Declaration of Rights in the Constitution of 1776, which was in force when *State v. Chase* was decided, the last clause of what is now article 8, and that there was the further declaration (article 33) that ‘no judge shall hold any other office, civil or military or political trust, or employment of any kind whatsoever, under the constitution or laws of this state, or of the United States, or any of them,’ the court used this emphatic language:

“‘It would seem thus to be made evident in our fundamental law that the policy and intent of that law is that the courts and judges provided for in our system shall not only not be required *but shall not be permitted* (italics ours) to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of the judicial function; and that the exercise of any power or trust or the assumption of any public duty other than such as pertain to the exercise of the judicial function is not only without constitutional warrant but *against the constitutional mandate* in respect to the powers they are to exercise and the character of duties they are to discharge.’

“The court further said:

“‘That counting the names upon a petition, ascertaining whether the names appended thereto are those of voters at the last election for Governor, and ordering an election, is not a judicial function, is a proposition that would seem to be too plain to need argument to enforce it. The order, which by the statute here under consider-

ation, the court is required to pass, is not to be the result of any judicial inquiry.' ”

In the case of *State v. Huber* (West Virginia), 40 S.E. 2d 11, 168 A.L.R. 808, quoting the syllabus:

“A statute attempting to confer original jurisdiction upon courts of record, concurrently with jurisdiction conferred upon a designated administrative agency, to entertain complaints relating to alleged violations of a statute regulating the sale of nonintoxicating beer, defining the procedure to be followed on such a complaint, and authorizing the court to suspend or revoke licenses issued by the administrative agency for the sale or distribution of such beverages, is an unconstitutional invasion of an exclusive function of the legislative departments of the government and confers no jurisdiction upon the court to entertain complaints in such cases.”

The Court in that case, at page 817 stated:

“\* \* \* Unquestionably, the power of regulation of public utilities, the licensing of businesses of all kinds, the regulation of such businesses, the general control thereof, including the power of revoking licenses or permits issued in connection therewith, is a legislative power. This power is subject to control by the courts only where, in the exercise thereof, there has been a violation of some State or Federal constitutional provision, limiting the Legislature in its right to perform certain acts in connection with the power it assumes to exercise. \* \* \*”

The Court further stated at page 818:

“\* \* \* It is the power which a regularly constituted court exercises in matters which are brought before it, in the manner prescribed by statute, or established rules of practice of courts, and which matters do not come within the powers granted to the executive, or vested in the legislative department of the Government. \* \* \*”

In this case the Court, at page 819 stated:

“The regulation of the manufacture, distribution and sale of nonintoxicating beer is clearly within the power of the Legislature, under the police power of the State. *Ninebaugh v. James*, 119 W Va 162, 192 SE 177, 112 ALR 59. Connected with the power to regulate, and as a necessary adjunct thereto, is the power to revoke licenses, which may be used in connection therewith. Without this power there could be no effective regulation. This being true, what place has the judicial department in that regulation, save and except to see that it is exercised in conformity with the general laws guaranteeing the citizens due process of law in matters affecting their rights, whether they be personal, or connected with their property? If the regulation of the sale of nonintoxicating beer is a legislative function, Article V of our Constitution expressly prohibits the exercise of that power by the courts.”

At page 821-822 the Court further states:

“We are mildly criticized for expressing the view that a strict rule should be applied in the

application of Article V of our Constitution, and our attention is called to cases in which this Court has stated that abstract, analytical lines of separation of powers have not and cannot be drawn. This is freely conceded. There is, necessarily, some mingling and overlapping of powers between the three separate departments of our State Government. These are incidental, and probably cannot be avoided. But if we sustain the present law, conferring jurisdiction on courts of record to entertain proceedings to revoke licenses to sell nonintoxicating beer, it will, in principle, amount to total destruction of the theory of separation of power, intended to be forever secured by Article V of our Constitution. We deem it our duty to attempt to enforce the true meaning, intent and purpose of Article V, rather than to encourage departure therefrom. \* \* \*"

It is further stated by the Court at page 825:

"\* \* \* But consideration of high public policy, and the plain terms of our Constitution, impel us to the conclusion that the licensing and regulation of the sale and distribution of nonintoxicating beer is the exclusive function of the legislative department of our Government, under the police power of the State; is not a judicial function; and cannot be made the subject of the exercise of judicial power, save only in cases where in the exercise by the Legislature of its power in the premises, there is a violation of the Constitution, or the laws of the State, or some arbitrary or fraudulent exercise of that power, or where its exercise is without excuse or without evidence, which in itself would be an arbitrary exercise of

power. Then and then only may judicial power, be invoked. \* \* \*''

The foregoing case is, in the opinion of the writer, determinative of the question presented and by reason of the length of the opinion it is most respectfully requested that the Court examine this case with particularity.

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#### SUA SPONTE.

It would appear to the writer of this brief that when it appears to a Court that a nonjudicial function is imposed upon that Court, to be exercised by that Court, that the Court should *sua sponte* either refuse to act or hold the offending act invalid.

It is common knowledge the Courts of Alaska, the judges and clerks thereof and attaches, as well as the general public and the attorneys that at least two months of each and every year is devoted by the Courts, the judges and the respective clerks' offices in processing and hearings of applications for liquor licenses, in some instances hearings having consumed as much as seventeen full Court days in the Third Judicial Division, and a like situation exists in the other judicial divisions of this Territory. All of this without taking into consideration the waste of time, effort and money of applicants for liquor licenses, as well as witnesses in the hearing of applications therefor, the time of counsel consumed, as well as the court's, the judge's and the clerical assistance of the respective clerks' offices.

The present condition in this Territory under which liquor licenses are granted should be brought to an end and the administration and regulation thereof should be placed where it belongs, namely, in a board or commission to be provided for by the legislature for that purpose and *not* in the Courts.

*Amicus curiae* respectfully submits that the Alaska Liquor Law is invalid by reason of imposing non-judicial functions on the District Court of Alaska and the judges thereof, which nonjudicial function is the heart of the act, and without such heart being able to function the entire body of the act must fall.

Dated, Anchorage, Alaska,

November 29, 1955.

Respectfully submitted,

JOHN E. MANDERS,

*Amicus Curiae.*

W 2899

No. 14501

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United States  
Court of Appeals  
for the Ninth Circuit

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WESTERN PACIFIC RAILROAD CORPORA-  
TION and ALEXIS I. DU PONT BAYARD,

*See vol. 2899* Appellants.

vs.

WESTERN PACIFIC RAILROAD COMPANY,  
Appellee.

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Transcript of Record  
In Two Volumes  
Volume I  
(Pages 1 to 52)

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Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.

FILED

OCT 13 1954





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For Appellee.



In the District Court of the United States, for the  
Northern District of California, Southern Division

No. 26591-S

In the Matter of:

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

PETITION OF THE WESTERN PACIFIC  
RAILROAD COMPANY FOR AN ORDER  
TO SHOW CAUSE

The petition of The Western Pacific Railroad Company, a reorganized railroad company, formerly the debtor and in due course discharged in the above-entitled proceeding, for an order to show cause why The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, its Receiver, should not be adjudged guilty of contempt of the Final Order of this Court dated March 28, 1946, respectfully shows:

That the said The Western Pacific Railroad Corporation, a corporation created by and existing under the laws of the State of Delaware, is a party to the above-entitled reorganization proceeding.

That in said Final Order this Court expressly found and concluded, among other things, that:

“(a) All of the business, assets and property constituting the debtor’s estate of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher

and Sidney M. Ehrman, as Trustees in Reorganization, vested in and became the absolute property of The Western Pacific Railroad Company on December 29, 1944, free and clear of all rights, claims, interests, liens and encumbrances of the former stockholders and creditors of the debtor company and all other persons, except as otherwise provided and directed in the order of this Court in this proceeding dated and entered November 27, 1944; and The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order."

That in said Final Order this Court ordered, adjudged and decreed, among other things, that:

"6. All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise, against The Western Pacific Railroad Company, or against the successors or assigns of said Company, or against any of the assets or property of said Company or its successors or assigns, directly or indirectly, on account of or based upon any right,



claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of said Company, and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and all such persons, firms and corporations are also hereby restrained and enjoined from prosecuting against the Reorganization Committee, or any of them, their agents or attorneys, or against the Trustees of the Debtor's estate, or either of them, their agents or attorneys, or against the said Company, its agents or attorneys, any suit or proceeding arising out of, or based on, any act or acts done or omitted to be done in putting into effect and carrying out the plan of reorganization or any order of this Court entered in these proceedings.

“9. The Court hereby reserves jurisdiction to take such further proceedings as may be proper or necessary to enforce and make effective any direction or other provision contained in the order of this Court, filed November 27, 1944, in this proceeding, to enforce and make effective the terms and provisions of this final decree and, if necessary, to give instructions to the Western Pacific Railroad Company, upon application by said Company, with respect to carrying out the provisions of said order filed November 27, 1944, and of this order; to take such further proceedings as may be proper or necessary in connection with any appeal or appeals prosecuted from any order of this Court, in this proceeding; and to take such further proceedings as may be necessary or proper in connection with any expenses or liabilities within the provisions of the order of this Court filed October 23, 1944, or otherwise, which may hereafter be asserted against the Reorganization Committee, its agents or attorneys, in connection with carrying out and putting into effect the plan of reorganization.”

That a copy of said Final Order was duly served within 30 days of its date on the said The Western Pacific Railroad Corporation. That no appeal was taken from said Final Order, that the time for appeal therefrom has expired, and that the said Final Order has become final and is now in full force and effect.

That Alexis I. du Pont Bayard is the Receiver of Western Pacific Railroad Corporation, duly ap-

pointed by the Chancery Court of the State of Delaware, in and for the County of New Castle, on or about October 19, 1949.

That on the 22nd day of April, 1954, the said The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, then and theretofore having knowledge of said Final Order heretofore referred to, commenced in the District Court of the United States, for the Northern District of California, Southern Division, a civil action numbered 33514 and entitled "Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, Plaintiffs, vs. Western Pacific Railroad Company, James Foundation of New York, Inc., and Western Realty Company, Defendants." That petitioner was served on the 26th day of April, 1954, with the summons and a copy of the bill of complaint filed in said action. That a copy of said bill of complaint, marked "Exhibit A," is attached hereto and is hereby incorporated herein.

That The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, have asserted in said action a claim against petitioner upon an unsecured indebtedness of the pre-reorganization The Western Pacific Railroad Company to The Western Pacific Railroad Corporation existing prior to August 2, 1935, which claim in the Plan of Reorganization was found to be without value and which by the prior orders of this Court was released and discharged. That the commencement of said action is not and has not been provided for or per-

mitted by any order of this Court. That the said action of The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, constitutes a violation of the Final Order of this Court dated March 28, 1946.

Wherefore, the petitioner asks that this Court issue forthwith its order to The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, directing them to show cause why they should not be adjudged guilty of and punished for contempt of the said Final Order of this Court, and for such other and further relief, including its costs and damages, as may be proper in the premises.

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ BURNHAM ENERSEN,

/s/ ROBERT L. LIPMAN,

Attorneys for The Western Pacific Railroad Company.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,

Of Counsel.

Duly verified.

EXHIBIT A

In the District Court of the United States for the  
Northern District of California, Southern Division

Civil Action No. 33514

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD,  
Receiver,

Plaintiffs,

vs.

WESTERN PACIFIC RAILROAD COMPANY,  
JAMES FOUNDATION OF NEW YORK,  
INC., and WESTERN REALTY COMPANY,  
Defendants.

BILL OF COMPLAINT

To the Honorable, the Judges of the District Court  
of the United States for the Northern District  
of California, Southern Division:

The Bill of Complaint (hereinafter referred to  
as the complaint) of Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, respectfully shows:

First: Western Pacific Railroad Corporation is a corporation duly organized and existing under the laws of the State of Delaware, and Alexis I. du Pont Bayard is Receiver of Western Pacific Railroad Corporation duly appointed by the Chancery Court of the State of Delaware in and for the County of New Castle (hereinafter referred to as the plaintiffs); and both of said plaintiffs are citizens and residents of the State of Delaware.

Second: The Western Pacific Railroad Company was the original petitioner in the reorganization proceedings under Section 77 of the Bankruptcy Act numbered 26591-S on the docket of this Court, the history of which, so far as material to this complaint and except as amplified herein, is judicially stated and found by the Honorable Louis E. Goodman, United States District Judge, in a certain action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Railroad Company, et al., No. 26508—Civil," to be as follows:

"Plaintiff is The Western Pacific Railroad Corporation; its subsidiary was Western Pacific Railroad Company, an operating railroad company, herein referred to as the 'debtor'; defendant, the reorganized subsidiary is The Western Pacific Railroad Company.

#### "Statement of Facts

"Plaintiff corporation, a so-called holding company, from 1916 to April 30, 1944, owned all the outstanding capital stock of the debtor. For some years prior to 1935, the financial condition of the debtor had been steadily worsening. In 1935 it filed a petition under Section 77 of the Bankruptcy Act (11 USC 205) and this Court in that year placed its affairs in the hands of trustees. Thereafter a plan of reorganization was proposed and in 1939 it was approved by the Interstate Commerce Commission, 233 ICC 409. Inter alia, it was determined in the plan that the capital stock of the debtor owned by the plaintiff was without equity or value

and that plaintiff and its stockholders therefore were not entitled to participate in the plan. In 1940 this Court approved the plan of reorganization, including approval of the findings of the Interstate Commerce Commission as to the worthlessness of the plaintiff's equity. The Circuit Court of Appeals (now Court of Appeals) of the Ninth Circuit reversed in 1941 (124 F. 2d 136). In 1943 the Supreme Court reversed the Circuit Court and affirmed the order of the District Court (318 U. S. 448). It there considered and rejected the contention of the plaintiff that it should have the right to participate in the plan because of recent increased earnings of the debtor (318 U. S. 508, 509).<sup>1</sup> Thereafter, the plan of reorganization was, in accordance with the statutory provisions (11 USC 205e), submitted to the creditors, and, after their approval, the plan was confirmed on October 11, 1943, by this Court. The reorganization committee designated in the plan of reorganization, instead of forming a new corporation, determined to use the corporate structure or shell of the old company (debtor) and to execute the plan of reorganization by revesting its former properties in the reorganized company, i.e., the defendant. On November 22, 1943, an agreement was made between the plaintiff, its secured creditors and the reorganization committee wherein a modus of revesting was set up. Among other things, the plain-

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<sup>1</sup>See in re Denver & R. G. W. R. Co. 10 Cir. 150 Fed. 2d 28 and R. F. C. v. D. & R. G. R. Co. 328 U. S. 495, where similar holdings upon similar contentions were made.

tiff agreed therein to transfer all of its stock in the debtor to the reorganization committee. This agreement was approved by this Court, in December, 1943. The transfer of the stock was not actually made until April, 1944, because of an unsuccessful litigative<sup>2</sup> attempt to prevent the same. During the period of years in which the plaintiff was the owner of all the outstanding stock of the debtor, plaintiff had followed the practice of filing consolidated or affiliated income tax returns, in which it had reported the earnings of the debtor as well as other affiliated companies, which the plaintiff wholly or partly owned. The amount of taxes paid by the plaintiff pursuant to such returns was allocated among the various subsidiary companies having taxable income in proportion to the amount of such taxable income. The practice of filing the consolidated returns continued throughout the reorganization period. The returns, during the reorganization period, were prepared by the employees of the debtor and signed by the president of the plaintiff corporation, although they were never submitted to its board of directors for approval or consideration.

“During the year 1942, the debtor made substantial net earnings. Neither plaintiff, nor any of its other subsidiary companies, had any earnings during 1942. A consolidated return was filed for the year 1942 in which the tax liability, due to the earnings of the debtor, was \$4,144,828. Later in 1943, after the filing of the 1942 return and payment of

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<sup>2</sup>Bryant v. Western Pac. R. Corp. 35 A. 2d 909 (Del. Ch. Feb. 10, 1944).



the tax, the tax attorneys for defendant 'discovered' Section 123 of the Revenue Act of 1942 (26 USC 23(g)4).<sup>3</sup> They proposed what they denoted a 'paradoxical' theory, by which the worthlessness of the plaintiff's stock (which had cost the plaintiff some \$75,000,000) in the operating railroad company (debtor), might be availed of as an offset to the operating income of the debtor and thus result in a net loss and no tax obligation. Further, their theory was that part of this \$75,000,000 loss in 1943, could be 'carried back' to 1942 (sec. 122(b)(1) of the Internal Revenue Code) and part could be 'carried over' to 1944 (Sec. 122(b)(2) of the Internal Revenue Code).

"Thereupon a claim for refund of the amount of tax paid for 1942 was filed in the name of the plaintiff. Operations of the debtor during 1943 and up to April 30, 1944, were increasingly profitable and, except for the offset of the capital stock loss of the plaintiff itself, would have called for the payment of some \$17,000,000 in income taxes. So the tax attorneys caused the filing of consolidated tax returns for 1943 and for the forepart of 1944 in the name of plaintiff, in which sufficient portions of the \$75,000,000 stock loss were used as offsets against the operating accounts for these years, so as to show

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<sup>3</sup>"Stock in affiliated corporation. For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset.' (Subsection 4 of Sec. 23g.) By this subsection, losses resulting from worthlessness of stock of an affiliated became operating losses instead of capital losses as theretofore.

no net income. The validity of the offsets was questioned by the Commissioner of Internal Revenue and conferences were had between the tax counsel for the defendant and the Commissioner. As a result, a tax settlement was made with the Commissioner whereby, in consideration of the withdrawal of the claim for refund, the Commissioner accepted and approved the returns. The nature and basis of this compromise settlement will be hereafter more fully discussed.

“Subsequent to the filing of the claim for refund of the 1942 tax paid, and the filing of the consolidated tax returns for 1943 and part of 1944, and after negotiations for the settlement of the entire tax issue with the Commissioner of Internal Revenue had started, the plaintiff, on October 10, 1946, filed its bill of complaint in equity herein. In substance the bill of complaint recited the filing of the claim for refund, the commencement of the negotiations for the approval of the consolidated returns and prayed that the Court settle the proprietary rights of the plaintiff and the defendant in the tax saving involved. It was further prayed that funds equivalent to the tax savings be placed in the custody of the court for proper and equitable distribution.<sup>4</sup>

“On April 7, 1947, the Court permitted the filing of a complaint in intervention on behalf of certain

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<sup>4</sup>The debtor had on two separate occasions set aside reserve funds for the payment of the taxes, to protect against the contingency of adverse ruling by Commission or Court.

stockholders of the plaintiff who wished to join in the demand of the plaintiff and in its prayer for relief against the defendant. The settlement and agreement with the Commissioner, by which the claim for refund was withdrawn and the consolidated returns for the years 1942, 1943 and part of 1944 were accepted and approved, was consummated on August 14, 1947.

“On December 17, 1947, plaintiff filed a supplemental bill of complaint, wherein the consummation of the settlement and compromise was set forth. It was there further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated return for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as ‘duality of control.’

“In the supplementary complaint, the plaintiff prayed that the Court, in equity, enter a decree allocating and directing the payment of the abated taxes, amounting to some \$17,000,000, to the plaintiff by way of mitigation of its losses in its subsidiary.

“After many preliminary motions were made and disposed of, and after the filing of answers by the defendant and after pre-trial conferences, the cause finally came on for trial.

“The trial itself consumed 13 days; the proceedings are set forth in 1700 pages of transcript; 14 witnesses testified and 164 exhibits, with various subdivisions, were introduced in evidence.

“A number of special defenses were pleaded and testimony and exhibits offered at the trial in support thereof.

“But I am of the opinion, in view of the fact that the cause is concededly of equitable cognizance, that decision must depend upon the essential righteousness of plaintiff’s claim as an equitable demand.

#### “Discussion

“The income tax picture presented is bizarre indeed. It is ‘paradoxical,’ as the defendant’s tax attorneys put it.<sup>5</sup> The Western Pacific Railroad Company, the operating company, profitably conducted its railroad facilities in reorganization during 1942, 1943 and the forepart of 1944. Its own profit and loss records showed the debtor to be accountable to the United States in the sum of \$21,346,567 income taxes for the years 1942, 1943 and the first four months of 1944. During this same period of time the plaintiff was still the legal owner of all the capital stock of the debtor, an ownership which had been declared by both the Interstate Commerce Commission and the Reorganization

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<sup>5</sup>In a letter dated May 20, 1943 (plff. Ex. 50), addressed to Curry, Vice President of defendant company, tax counsel Polk set forth his idea of using the plaintiff’s stock loss in the debtor to offset debtor’s profits, saying: ‘This is commented upon rather than suggested, since it is paradoxical to compute a loss upon the operating company’s stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless.’ (Interlineation supplied.)

Court to be valueless. But the tax attorneys for the defendant conceived a 'paradoxical' plan. They decided that they would file, pursuant to Section 141 of the Internal Revenue Code and the Treasury Regulations issued thereunder<sup>6</sup> affiliated or consolidated returns on behalf of the parent company and its subsidiaries and in them set up the plaintiff's stock loss (i.e., its ownership in the debtor) as an income tax deduction against the operating profits. Ostensibly they found their authority for so doing in Section 123 of the Revenue Act of 1942 (26 USC Sec. 23(g)4).<sup>7</sup> Thus, part of the lost \$75,000,000 stockholding of the plaintiff in the debtor was applied as an offset to operating profits during each of the three years in question to the end that no part of the \$21,346,567 tax would be paid.

"This was more than mere tax 'saving'; it amounted to a complete tax 'escape.' But the debtor had already paid \$4,144,828 income taxes for the fiscal year 1942 and it had filed a claim for refund of such taxes upon the ground that it owed no taxes for 1942 if, on the theory of 'carry-back,' part of the \$75,000,000 stock loss was a proper deduction. So in order to make the far larger saving or 'escape' offered for the three years in question, the claim for refund was waived and the Commissioner then

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<sup>6</sup>Sec. 141 Internal Rev. Code permits the filing of a consolidated return by affiliated corporations. Regulations 104 and 110 contain detailed requirements for such filing.

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<sup>7</sup>See footnote # 3.

accepted the returns for 1942-1943 and the fore part of 1944. The effect of this was that the debtor paid \$4,144,828 taxes to the United States in order to escape the \$21,346,567 previously mentioned, or a net saving or 'escape' of \$17,201,739. To all of this the Commissioner agreed. It was stated to be a compromise because of some question as to the date of definite ascertainment of the stock loss. The Commissioner apparently agreed that, under the 1942 amendment (Sec. 23(g)4), it was proper to offset the capital stock loss against the net operating gain, and the taxpayer paid \$4,144,828 to resolve some alleged uncertainty as to the date of ascertainment of the stock loss.<sup>8</sup>

"How the amendment to the statute, Sec. 23(g)4), could have been availed of by the debtor is, mildly stated, puzzling, if not downright amazing. Its application in an orthodox case is understandable. The theory of deducting a loss in an economic aggregation of affiliated corporations, where one unit gains and the other unit loses, has been recognized and approved by Congress and the Courts.

"Prior to the Revenue Act of 1938, losses resulting from the worthlessness of stocks and bonds were deductible from ordinary income and were not subject to the so-called capital-loss limitations. These

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<sup>8</sup>"It is not at all clear to the Court how the alleged uncertainty as to the date of ascertainment of the stock loss could have been a true factor affecting the tax settlement inasmuch as any such uncertainty would, if it existed, as well apply with respect to the 1943 and 1944 returns."

limitations, that is that a capital loss could only offset a capital gain, had applied only to sales and exchanges, with the result that it was more advantageous to allow stocks, that might become worthless, to become worthless rather than to sell them. By the 1938 Act losses sustained by reason of the worthlessness of securities were treated as if they resulted from the sale or exchange of capital assets and thus were subject to the limitations applying to deductions in the form of capital losses, 26 USC 23(g)4, which was Section 123 of the Revenue Act of 1942, accorded losses on worthless stocks held by a taxpayer in affiliated corporations the same treatment accorded losses from all worthless securities prior to the Revenue Act of 1938."

Third: As the result of the various steps outlined in the foregoing quoted part of the opinion of the District Court, which was formally adopted by the District Court as its Findings of Fact, a net fund amounting to \$17,201,739 is in the possession of the Western Pacific Railroad Company, having been transferred to it by Thomas M. Schumacher and Sidney Ehrman, Trustees, subject to an Assumption Agreement whereby it assumed:

"Generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's property by the said Trustees, or their conduct of the debtor's business."

Fourth: The Plan of Reorganization of the debtor

referred to in the opinion quoted above was certified to the District Court by the Interstate Commerce Commission June 21, 1939, and was approved by the District Court August 15, 1940, at a time when a loss resulting from the worthlessness of securities owned by a holding corporation, in which category petitioner Western Pacific Railroad Corporation belongs, could be offset only against capital gains occurring in the same tax period, but on October 21, 1942, Congress inserted in the following provision of the Internal Revenue Code forming part of Section 23 the paragraph thereof numbered (g)(4):

“Deductions from gross income. In computing net income there shall be allowed as deductions:

“\* \* \*

“(g)(2) Securities becoming worthless. If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange on the last day of such taxable year of capital assets.

“\* \* \*

“(4) Stock in affiliated corporations. For the purpose of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. For the purpose of this paragraph a corporation shall be deemed affiliated only if:

“(A) At least 95 per centum of each class of its stock is owned directly by the taxpayer; and \* \* \*”



Fifth: The enactment of the foregoing Section 23(g)(2)(4) on October 21, 1942, authorizing restoration out of consolidated taxable income of the lost capital of the parent invested in the securities of a subsidiary could not have been reasonably anticipated or foreseen by the Interstate Commerce Commission on June 21, 1939, when it certified the Plan of Reorganization to this Court, and on October 10, 1946, the plaintiffs Western Pacific Railroad Corporation filed in this Court the suit hereinbefore referred to (in which suit at a subsequent stage Alexis I. du Pont Bayard was added as an additional plaintiff) against Western Pacific Railroad Company, the debtor in the Bankruptcy proceedings 26591-S and the obligor under the Assumption Agreement hereinbefore mentioned, and also against the additional parties named in the subjoined footnote as defendants,\* praying an accounting by the reorganized Western Pacific Railroad Company in respect of the use under federal consolidated income and excess profits tax returns of the plaintiffs' tax credit in the amount necessary to effect a relinquishment of its taxable income up to \$17,201,739 under Section 23(g)(2) and (4) set out above. The subsequent history of this accounting proceeding and the antecedent history of Section 77 proceeding for the reorganization of the debtor

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\*The Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, The Western Realty Company, The Standard Realty and Development Company, and Delta Finance Company, Ltd.

Railroad Company are within the judicial knowledge of this Court, as revealed by the official reports in chronological order cited below.\*

Sixth: Under the Internal Revenue Code and the Regulations of the Treasury of the United States thereunder, the plaintiff Western Pacific Railroad Corporation was free to join or refuse to join in consolidated returns as it saw fit, and was under no statutory duty to file consolidated returns and was free to make its own decision whether to file or not to file on the basis of its own interests.\*\* But the Court of Appeals held (Judge Fee dissenting) in response to repeated assertions of the defendant Railroad Company that it had not paid its pre-reorganization debts and that the plaintiff Western Pacific Railroad Corporation was under an equit-

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\*Western Pacific Railroad Company Reorganization, 230 I.C.C. 61; 233 I.C.C. 409; in re Western Pacific Railroad Company, No. 26591-S, 34 F. Supp. 493; Western Pacific Railroad Company vs. Reconstruction Finance Corporation, et al., and four other cases, No. 9712, 124 Fed. 2d 136 (1941); Ecker and others vs. Western Pacific Railroad Corporation, et al., 318 U. S. 418 (1943); Western Pacific Railroad Corporation vs. Western Pacific Railway Company, et al., No. 26508, 85 F. Supp. 869 (1949); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 197 Fed. 2d 994 (1951); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 345 U. S. 247 (1953); and after remand 205 Fed. 2d 374, 206 Fed. 2d 495.

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\*\*Treasury Regulation 109, Sec. 23—16a and 11a—Duke Power Company v. Commission, 44 Fed. 2d 543, 545 (4 Circuit).

able duty as fiduciary to join in consolidated returns and thereby donate its tax credit and the avails thereof to the reorganized defendant Railroad Company because its creditors had not been fully paid. The following is from the prevailing opinion written by Judge Byrne:

“The Corporation was the sole owner of the subsidiary’s (the debtor’s) capital stock. As such it was under a duty to deal fairly with the subsidiary, having full regard for the interests of the creditors and holders of other securities. Consolidated Rock Products Co. v. Du Bois (312 U. S. 510). It owed a duty not to require the subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. \* \* \* If Corporation had required tribute as a condition of its co-operation then it would have been acting with less than the required standard of fairness to the subsidiary’s creditors.”

The plaintiffs are bound by and accept this determination of the Court of Appeals, and their purpose and objective in filing this successoral complaint is to provide the essential machinery or medium for implementing it and requiring the reorganized Western Pacific Railroad Company, as in duty bound under its Assumption Agreement as the trustee-custodian of the fund also to accept it and to carry it into effect.

Seventh: The doctrine of Consolidated Rock Products Company vs. Du Bois (312 U. S. 510) is that junior interests in a bankruptcy or equity administration proceeding cannot be given any part

or securities representing any part of the debtor's estate unless and until full compensatory treatment is given for the entire bundle of rights which the senior creditors surrender. In the proceeding 26591-S, the Plan of Reorganization approved by this Court and by the Supreme Court of the United States allotted to the senior creditors, in full satisfaction of their claims, securities representing in the determination of the Interstate Commerce Commission and of the Court the full value of their claims without resorting to an excess value of the senior liens which they surrendered; and thereupon gave a residue valued at \$5,964,296 to creditors secured by liens wholly subordinate to the liens held by the senior creditors. It is accordingly *res adjudicata* in the proceeding 26591-S that any fiduciary duty of the plaintiffs Western Pacific Railroad Corporation to donate its special tax credit, or taxes remitted there against, under Section 23(g)(2)(4) is one to be exercised for the exclusive benefit of the creditors of the debtor Western Pacific Railroad Company left unprovided for or inadequately provided for under the Plan of Reorganization approved by the Supreme Court of the United States in *Ecker vs. Western Pacific Railroad Corporation*, 318 U. S. 448.

Eighth: In the exercise of its jurisdiction in the proceedings 26591-S, the Interstate Commerce Commission determined the amount of the indebtedness of the debtor as of January 1, 1939, for which full compensatory treatment was not accorded under the

Plan of Reorganization to be \$13,914,530, of which \$6,249,750 was due and owing to the A. C. James Company; \$7,609,370 was due and owing to the plaintiff Western Pacific Railroad Corporation, and \$60,410 was due and owing to Western Realty Company. The claim of the A. C. James Company was liquidated in part out of collateral pledged by the debtor (junior lien bonds of the debtor or new securities issued thereagainst and substituted therefor) and the unliquidated balance as shown by an exhibit introduced by the defendant Railroad Company in said action "No. 26508 Civil" is \$3,495,000 but is subject to adjustment bringing it up to \$3,683,175.\* In addition to the creditor claims so determined and allowed by the Interstate Commerce Commission the claim of plaintiff Western Pacific Railroad Corporation as owner of all of the debtor's preferred stock was allowed in the amount in excess of \$40,000,000.\*\*

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\*In the exhibit introduced by the defendant Railroad Company to establish the deficiency of the A. C. James Company, it was charged with 37,635 shares of new common stock at \$62 instead of its true currency value of \$57 as fixed by the treatment accorded the senior lien creditors—exhibit (defendant's) No. 33, record page 2022.

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\*\*A secured claim of Railroad Credit Corporation was fully liquidated by the use of common stock pledged at \$62 per share and certain Accommodation Collateral supplied by Western Pacific Railroad Corporation, the unused balance of which Accommodation Collateral was restored to Western Pacific Railroad Corporation under a decree of the Chancery Court of the State of Maryland.

Ninth: As hereinbefore alleged the plaintiffs are filing this complaint as an independent or successor action in equity to provide an essential machinery or medium for implementing the decree or judgment in said action "No. 26508 Civil" and for an administration of the trust arising thereunder or in consequence thereof and as a civil action in equity between citizens of different states, viz., the plaintiffs Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, both being citizens and residents of the State of Delaware and Western Pacific Railroad Company, a corporation, organized and existing under the laws of the State of California, as a defendant, wherein the amount in controversy greatly exceeds \$5,000.00.

Tenth: James Foundation of New York, Inc., successor to the creditor position of A. C. James Company, is a corporation of the State of New York; and Western Realty Company is a corporation of the State of Colorado, and each being an unsatisfied creditor of the debtor, and as such a beneficiary of the trust created as hereinbefore alleged, is an interested but not an indispensable party to this proceeding, and being such both also have been named as parties defendant herein.

Eleventh: The reason why this complaint was not filed at a earlier date is that the status of the \$17,-201,739 fund in the custody of the reorganized Western Pacific Railroad Company, defendant herein, was not finally established until the denial of the second petition for certiorari at the present

term of the United States Supreme Court in said action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Rr. Co., et al., No. 26508-Civil."

Twelfth: While said second petition for certiorari was pending in the United States Supreme Court on application for rehearing, the plaintiff receiver wrote the President of the defendant Railroad Company as follows:

"If the Supreme Court denies our pending petition for a rehearing of the application for certiorari and establishes the position taken by your counsel throughout the litigation that the \$17,000,000 fund in your custody is a trust fund for the satisfaction of the unpaid creditors of your company (pre-reorganization) it is our purpose to apply to the Bankruptcy Court for a proper application of the fund to that purpose. I am writing this in advance to put you and your directors on notice of our position."

No reply to or acknowledgment of said communication has been received by the plaintiffs but they are informed and allege that the defendant Railroad Company proposes to divert the fund to purposes other than the payment and satisfaction of claims of partially paid and wholly unpaid (pre-reorganization) creditors of the defendant Railroad Company and to utilize it for the enrichment of the creditors, and successors in interest of creditors that received full compensatory treatment under the Plan of Reorganization.

Wherefore, the plaintiffs pray:

(1) That this Court make cognizance of this cause and grant unto them a writ of subpoena of the United States directed to Western Pacific Railroad Company, James Foundation of New York, Inc., and Western Realty Company, named as defendants herein, service upon the two defendants last named to be made by the Marshal of the District wherein personal service may be effected;

(2) That this Court grant unto the plaintiff a judgment or decretal order adjudging that the fund of \$17,201,739 in the possession of the reorganized Western Pacific Railroad Company is held by it subject to the Assumption Agreement executed by it pursuant to the order and decree of this Court in the proceeding 26591-S\* in the order of their respective priorities and for the interests junior thereto as heretofore determined by the Interstate Commerce Commission;

(3) That this Court enter a preliminary order placing said fund of \$17,201,739 in judicial custody and requiring and directing the defendant Western Pacific Railroad Company to hold said fund subject to the further order or orders of this Court which may include an order or orders providing therefrom currently for the expenses of the plaintiffs and their attorney and counsel in resisting the threatened conversion thereof; and

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\*[and is held by it in trust for the benefit of the unpaid and unsatisfied creditors of the debtor in said proceedings 26591-S.] (Interlineated April 29, 1954.)



(4) That the plaintiffs may have such further relief by way of declaratory judgment or decree of injunction, temporary or permanent, or both, or otherwise as to the Court may seem meet.

Dated April 21, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD,  
RECEIVER,

Plaintiffs;

By LEROY R. GOODRICH,  
Their Attorney.

FRANK C. NICODEMUS, JR.,  
WILLIAM MARVEL,  
Counsel.

[Endorsed]: Filed May 13, 1954.

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[Title of District Court and Cause.]

PETITIONER'S POINTS AND AUTHORITIES  
IN SUPPORT OF ITS PETITION FOR AN  
ORDER TO SHOW CAUSE

I.

A violation of the injunctive provisions of the Final Order of this Court in the above-entitled proceeding by filing suit against petitioner on a claim that was released and discharged is punishable as a contempt of court.

(Order of Judge St. Sure in these proceedings dated March 19, 1947, holding The Western Pacific Railroad Corporation to be in contempt, copy of which is attached hereto as Exhibit I.)

In re Mustin (1908),  
165 Fed. 506.

In re Bunnell (1937),  
19 F. Supp. 861.

See also:

United States v. United Mineworkers (1947),  
330 U. S. 258 (John L. Lewis contempt case).

## II.

It was the purpose of the above-entitled reorganization proceeding to put at rest claims against the debtor and the reorganized company such as the plaintiffs in said action # 33514 now seek to assert.

Western Pacific R. Corp. v. Western Pacific  
R. Co. (1949), 85 F. Supp. 868, 874, 875:

“\* \* \* the philosophy underlying Section 77 of the Bankruptcy Act stands as a barrier against the equitable validity of plaintiff's claim in this cause. Rehabilitation of a debtor by readjusting its financial structure in the interest of the debtor, its creditors and the public, in a fair and equitable plan of reorganization, is the essential purpose of Section 77. If a debtor in fact has an equity, it is and should be recognized. If not, it is disregarded. Above all, Section 77 was devised to provide in the public in-

terest both a speedy and efficient means of resuscitating, among others, sick and ailing railroads.

“(Citations.)

“When it was finally determined, after running the full gamut of court and administrative procedure, in the reorganization of the Western Pacific Railroad Company, that the plaintiff’s interest was worthless, nothing short of some extraordinary cause justifying reopening the reorganization proceeding could effect a change. To make any award in this cause, under the assumed authority of equity principles, would be in effect to modify the administrative and judicial judgments in the reorganization proceeding. Such a procedure would be an indirect nullification of the purpose of the reorganization statute, in the guise of an afterthought allegedly of equitable persuasion.”

Respectfully submitted,

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ BURNHAM ENERSEN,

/s/ ROBERT L. LIPMAN,

Attorneys for The Western Pacific Railroad Company.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,

Of Counsel.

## EXHIBIT No. 1

In the District Court of the United States, for the  
Northern District of California, Southern Division

No. 26591-S

In the Matter of:

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER ADJUDGING THE WESTERN  
PACIFIC RAILROAD CORPORATION  
GUILTY OF CONTEMPT OF THE FINAL  
ORDER OF THIS COURT HEREIN

The petition of The Western Pacific Railroad Company, the Debtor herein, now discharged, for an order adjudging The Western Pacific Railroad Corporation guilty of contempt of the Final Order of this Court dated March 28, 1946, in the above-entitled proceeding, came on regularly for hearing and was heard by the Court on June 11, 1954, pursuant to the Order to Show Cause issued thereon, and briefs having been filed as permitted by the Court, the matter has been submitted to the Court for decision.

The Court, being fully advised, finds:

(a) That The Western Pacific Railroad Corporation is a corporation created and existing under the laws of the State of Delaware, and is a party to the above-entitled reorganization proceeding.

(b) That a copy of the Final Order of this Court made and filed herein on March 28, 1946, was duly served on The Western Pacific Railroad Corporation within thirty days after March 28, 1946.

(c) That no appeal was taken from said Final Order, that the time for appeal therefrom has expired, and that said Final Order has become final and is now in full force and effect.

(d) That on August 24, 1946, said The Western Pacific Railroad Corporation commenced in this Court an action against the petitioner and others numbered 26333-H and entitled "The Western Pacific Railroad Corporation, Plaintiff, vs. Sacramento Northern Railway, The Western Pacific Railroad Company and American Trust Company of San Francisco, as Trustee under an Indenture executed by Sacramento Northern Railroad as of July 1, 1918, Defendants"; and that on August 27, 1946, the petitioner was served with the summons and a copy of the bill of complaint in said action, a copy of which bill of complaint is attached to and incorporated in said petition.

(e) That said action No. 26333-H is still pending in this Court.

(f) That in and by said action The Western Pacific Railroad Corporation has asserted and now asserts a claim against the petitioner which, if it exists at all, existed on and before December 28, 1944, and was released and discharged by said Final Order; that the assertion of such a claim was and is barred and enjoined by said Final Order; and that the commencement of said action is not

and has not been provided for or permitted by any order of this Court.

(g) That in commencing and in maintaining said action against the Western Pacific Railroad Company, The Western Pacific Railroad Corporation has violated and continues to violate said Final Order of this Court in this proceeding.

The Court further finds and concludes that The Western Pacific Railroad Corporation is guilty of contempt of said Final Order of this Court in commencing and maintaining said action No. 26333-H against The Western Pacific Railroad Company.

Now, Therefore, It is Hereby Ordered, Adjudged and Decreed:

1. That The Western Pacific Railroad Corporation is in contempt of this Court.

2. That The Western Pacific Railroad Corporation shall pay to The Western Pacific Railroad Company the full amount of all costs, counsel fees and damages paid, incurred or suffered by The Western Pacific Railroad Company by reason of or on account of the commencing and maintaining of said action No. 33514 against it, which amount shall be determined by this Court upon application therefor by The Western Pacific Railroad Company and after a hearing upon such application not less than five days after notice to and service of a copy of such application upon counsel for The Western Pacific Railroad Corporation.

3. That The Western Pacific Railroad Corpora-

tion may purge itself of such contempt by dismissing its said action No. 26333-H as to The Western Pacific Railroad Company within the period of fifteen (15) days following service of a copy of this order upon counsel for The Western Pacific Railroad Corporation, and in case it shall so dismiss said action within said fifteen-day period The Western Pacific Railroad Corporation shall be released from its obligation to make payment to The Western Pacific Railroad Company as provided in the preceding paragraph of this order.

Dated: March 19, 1947.

A. F. ST. SURE,  
Judge.

[Endorsed]: Filed May 13, 1954.

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[Title of District Court and Cause.]

ORDER TO THE WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. DU PONT BAYARD, ITS RECEIVER, TO SHOW CAUSE WHY THEY SHOULD NOT BE ADJUDGED GUILTY OF CONTEMPT

It appearing by the verified petition of The Western Pacific Railroad Company, formerly the debtor and in due course discharged in the above-entitled proceeding, that The Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, its receiver, have commenced an action in the District Court of the United States, for the Northern District of

California, Southern Division (No. 33514), which asserts a claim against the said The Western Pacific Railroad Company in violation of this Court's Final Order in this proceeding dated March 28, 1946; and the Court being fully advised, it is hereby

Ordered, that The Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, its receiver, show cause before this Court in the courtroom of the undersigned judge of said Court, in the United States Post Office and Court House Building, in the City and County of San Francisco, State of California, on the 11th day of June, 1954, at 10 o'clock a.m., why they should not be adjudged guilty of and punished for contempt of this Court for violation of the said Final Order dated March 28, 1946 and why this Court should not grant petitioner such other and further relief, including its costs and damages, as may be proper in the premises.

Service of this order, together with a copy of the petition upon which it was granted, on or before May 28th, 1954, shall be sufficient service thereof.

Dated: May 13th, 1954.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed May 13, 1954.



[Title of District Court and Cause.]

THE RESPONDENTS' RETURN TO THE  
ORDER TO SHOW CAUSE WHY THEY  
SHOULD NOT BE ADJUDGED GUILTY  
OF AND PUNISHED FOR CONTEMPT OF  
THIS COURT

Now come the respondents plaintiff in Civil Action No. 33514 and as their Return to the Order to Show Cause why they should not be adjudged guilty of and punished for contempt of this Court for violation of the final Order of this Court, dated March 28, 1946, respectfully show:

First: The successoral action commenced by the respondents in this Court, being Civil Action No. 33514, was brought against the defendant Western Pacific Railroad Company under the Assumption Agreement executed by the defendant Western Pacific Railroad Company as required by said final Order to enforce a valid and subsisting liability of the reorganization Trustees which was transferred to the reorganized Western Pacific Railroad Company; and it is an excepted action provided for and contemplated by said final decree of March 28, 1948, and in no respects violative thereof.

Second: Said successoral action was brought by respondents to implement a determination of the Court of Appeals in the Ninth Circuit in an earlier and substantially identical action brought by them under said Assumption Agreement, by providing a machinery or medium for the administration of a

trust resulting therefrom in respect of a fund of \$17,201,739.00 in the custody of the defendant Railroad Company but held by it subject to all of its obligations under said Assumption Agreement.

Third: Said successoral action was brought by the respondents under authority and at the direction of the Chancery Court of the State of Delaware, County of New Castle, as appears from the Affidavit of William Marvel, Attorney for the Receiver, filed herewith as part of this Return.

And having thus fully answered, and with profound respect, made their return to the Order, and adequate cause being shown, the respondents respectfully pray that the Order to Show Cause be dissolved.

Dated: May 28, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD,  
RECEIVER,

Plaintiffs;

By /s/ LEROY R. GOODRICH,  
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,

/s/ WILLIAM MARVEL,  
Counsel.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM MARVEL, AT-  
TORNEY FOR ALEXIS I. DU PONT BAY-  
ARD, RECEIVER

State of Delaware,  
New Castle County—ss.

Be It Remembered that on this 26th day of May, 1954, personally came before me, the subscriber, a Notary Public for the State and County aforesaid, William Marvel, Attorney for Alexis I duPont Bayard, Receiver, who, being by me first duly sworn, did depose and say:

That by order of April 19, 1950, he was appointed attorney of record for the said Receiver by the Honorable Collins J. Seitz, Chancellor of the State of Delaware.

1. That Western Pacific Railroad Corporation is in process of liquidation in the Court of Chancery of the State of Delaware, in and for New Castle County, and Alexis I. duPont Bayard is its Receiver; and that he is informed that it is one of the three unpaid pre-organization creditors of Western Pacific Railroad Company.

2. That the action in the District Court for the Northern District of California, Southern Division, designated as Civil Action No. 33514, was commenced under the general authority and direction of the Chancellor of the State of Delaware, by Western Pacific Railroad Corporation and Alexis

I. duPont Bayard, its Receiver, against the reorganized Western Pacific Railroad Company, as the principal defendant, and James Foundation of New York and Western Realty Company, the two remaining unsatisfied pre-organization creditors, as secondary defendants for the following reasons:

(a) That the final orders and decrees of the Bankruptcy Court in No. 26591-S required the defendant Western Pacific Railroad Company to execute an assumption agreement whereby it assumes all liabilities of the Trustees growing out of their operations as such Trustees in a period which included January 1, 1942; April 30, 1944, and excepted from the inhibitions in the final orders and decrees against further litigation any suit brought under the assumption agreement to enforce a liability of the Trustees growing out of such operation;

(b) That the stock-loss tax credit in the use of which by the Trustees a tax liability of the Trustees for said period amounting to \$17,201,739 was relinquished by the Treasurer of the United States was the exclusive property of Western Pacific Railroad Corporation and was never an asset of the Western Pacific Railroad Company;

(c) That Western Pacific Railroad Corporation on October 10, 1946, in accordance with the authorization of the final orders and decrees in the Bankruptcy Court brought suit under the assumption agreement in the same District Court, being Civil Action No. 26508 against the reorganized Western Pacific Railroad Company, to require it to account to the plaintiff as the exclusive owner of said tax

credit for the amount of taxes relinquished there-against by the Treasurer of the United States;

(d) That accountability to Western Pacific Railroad Corporation as owner of the tax credit was denied and its expropriation by the Trustees was finally sanctioned by the Court of Appeals, in the Ninth Circuit, for the reason, as determined by that Court, that Western Pacific Railroad Corporation, as owner of all preferred and common stock of the pre-reorganization Western Pacific Railroad Company, owed a fiduciary duty and obligation to utilize its tax credit for the benefit of the creditors of the pre-reorganization Railroad Company.

3. That it was and is his opinion communicated to Alexis I. duPont Bayard, Receiver, that there is a justiciable question whether the defendant, Western Pacific Railroad Company, under the assumption agreement as successor to the obligations of the Trustees is not as a consequence of the opinion of the United States Court of Appeals in the Ninth Circuit accountable to such creditors to the same extent that it would have been accountable to the Western Pacific Railroad Corporation if the superior equity of the unsatisfied creditors had not supervened.

4. That it was and is his opinion, also communicated to Alexis I. duPont Bayard, Receiver, that the right of the Western Pacific Railroad Corporation and its said Receiver, as an unsatisfied creditor to require the Trustees to recognize their superior equity and to enforce that right under the assump-

tion agreement against the defendant Western Pacific Railroad Company is in principle the same as the right asserted under the assumption agreement in *Western Pacific Railroad Corporation, et al., vs. Western Pacific Railroad Company, et al., No. 26508*, which was not questioned by the Court of Appeals or the United States Supreme Court as being affected by the injunctive provisions of the decree of the Bankruptcy Court entered on March 28, 1946.

/s/ WILLIAM MARVEL.

Sworn to and subscribed before me the day and year aforesaid. Witness my hand and seal of office.

[Seal]      /s/ FLORENCE P. BAGLEY,  
Notary Public.

[Endorsed]:    Filed June 1, 1954.

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[Title of District Court and Cause.]

### ACKNOWLEDGMENT OF SERVICE

Service of the paper hereinafter described is acknowledged by the undersigned this 1st day of June, 1954.

Return of Western Pacific Railroad Corporation as respondent to Order to Show Cause why it should not be adjudged guilty of contempt, made May 13, 1954, by the Honorable Louis E. Goodman, United States District Judge, together with Affidavit of

William Marvel, Attorney for Alexis I. Du Pont Bayard, Receiver.

ALLAN P. MATTHEW,  
JAMES D. ADAMS,  
BURNHAM ENERSEN,  
ROBERT L. LIPMAN,

By /s/ JAMES D. ADAMS.

[Endorsed]: Filed June 1, 1954.

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In the United States District Court, for the Northern District of California, Southern Division  
No. 26591

In the Matter of:

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER ADJUDGING THE WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. DU PONT BAYARD, RECEIVER, GUILTY OF CONTEMPT

The petition of The Western Pacific Railroad Company, the Debtor herein, now discharged, for an order adjudging The Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver guilty of contempt of the Final Order of this Court dated March 28, 1946, in the above-entitled proceeding, came on regularly for hearing and was heard by the Court on June 17, 1954, pursuant to the Order to Show Cause issued thereon, and briefs having been filed as permitted by the Court, the matter has been submitted to the Court for decision.

The Court finds that each and all of the allegations of the petition are true and correct.

The Court finds that The Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, receiver, are guilty of contempt of the final order of this Court in commencing and maintaining Action # 33514 against The Western Pacific Railroad Company.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That The Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, are, and each of them is, in contempt of this Court.

2. That The Western Pacific Railroad Corporation and the said Receiver shall pay to The Western Pacific Railroad Company the full amount of all costs, counsel fees and damages paid, incurred or suffered by The Western Pacific Railroad Company by reason of or on account of the commencing and maintaining of said action No. 33514 against it, which amount shall be determined by this Court upon application therefor by The Western Pacific Railroad Company and after a hearing upon such application not less than five days after notice to and service of a copy of such application upon counsel for The Western Pacific Railroad Corporation.

Dated: June 28, 1954.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed June 28, 1954.



[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, respondents under an order to show cause, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order made and entered June 28, 1954, by the Honorable Louis E. Goodman, United States District Judge, upon the motion of the Western Pacific Railroad Company, granting said motion and finding that said respondents are guilty of contempt of said District Court in commencing and maintaining an Action No. 33514 in said District Court against the Western Pacific Railroad Company.

Dated: July 26, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD,  
Receiver,

Plaintiffs;

By /s/ LEROY R. GOODRICH,  
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,

/s/ WILLIAM MARVEL,  
Counsel.

[Endorsed]: Filed July 28, 1954.

[Title of District Court and Cause.]

### BOND ON APPEAL FOR COSTS

Know All Men by These Presents:

That Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Receiver, as Principals, and United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to transact its business of suretyship in the State of California, as Surety, are held and firmly bound unto the above-named Debtor, The Western Pacific Railroad Company, in the full and just sum of Two Hundred Fifty and 00/100 (\$250.00) Dollars, lawful money of the United States of America, to be paid to the said above-named Debtor, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of July, 1954,

The Condition of the Above Obligation is such, That

Whereas, on the 28th day of June, 1954, upon the petition of the Western Pacific Railroad Company, the Debtor herein, for an Order adjudging the Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Receiver, guilty of contempt of the final Order of this Court dated March 28, 1946.

by reason of the filing and maintaining of Action No. 33514 against the Western Pacific Railroad Company, and

Whereas, on June 28, 1954, such Order adjudging said Respondents in contempt was made and said Respondents have appealed to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, if the said Respondents shall pay the costs if said appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the Order is modified, then the above obligation to be void; otherwise to remain in full force and effect.

/s/ LEROY R. GOODRICH,  
Attorney for Respondents.

UNITED STATES FIDELITY AND GUAR-  
ANTY COMPANY,

By /s/ MILDRED DROST,  
Attorney-in-Fact.

Aug. 11, 1954.

State of California,  
County of Alameda—ss.

On July 27, 1954, before me, Boyd A. Gibson, a Notary Public in and for the County of Alameda, personally appeared Mildred Drost, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of

the United States Fidelity and Guaranty Company thereto as principal and his own name as Attorney-in-fact.

[Seal]      /s/ BOYD A. GIBSON,  
Notary Public in and for the County of Alameda,  
State of California.

Aug. 11, 1954.

[Endorsed]: Filed July 28, 1954.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellants:

Petition of the Western Pacific Railroad Company for an order to show cause with Exhibit A attached.

Petitioner's points and authorities in support of its petition for an order to show cause.

Order to the Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, its receiver, to show cause why they should not be adjudged guilty of contempt.

The Respondent's return to the order to show cause why they should not be adjudged guilty of and punished for contempt of this court.

Acknowledgment of Service.

Order adjudging the Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, guilty of contempt.

Notice of Appeal.

Cost bond on appeal.

Designation of record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this District Court, this 3rd day of September, 1954.

[Seal]                      C. W. CALBREATH,  
Clerk;

By /s/ WM. C. ROBB,  
Deputy Clerk.

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[Endorsed]: No. 14,501. United States Court of Appeals for the Ninth Circuit. Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Appellants, vs. Western Pacific Railroad Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 3, 1954.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14501

IN RE WESTERN PACIFIC RAILROAD COM-  
PANY,

Debtor,

THE WESTERN PACIFIC RAILROAD COR-  
PORATION and ALEXIS I. DU PONT  
BAYARD, Receiver,

Appellants,

THE WESTERN PACIFIC RAILROAD COM-  
PANY,

Appellee.

STATEMENT OF POINTS ON WHICH THE  
WESTERN PACIFIC RAILROAD COR-  
PORATION AND ALEXIS I. DU PONT  
BAYARD, ITS RECEIVER, WILL RELY

The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, its receiver, have heretofore appealed to the United States Court of Appeals for the Ninth Circuit from the Order, made and filed on June 28, 1954, by the Honorable Louis E. Goodman, United States District Judge, adjudging The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, its receiver, guilty of contempt of the Final Order of the District Court, dated March 28, 1946, in the above-entitled proceeding, in commencing and maintaining Action No.

33514 against The Western Pacific Railroad Company.

Appellants hereby make the following statement of points upon which they will rely:

1. That the District Court was in error in making its order of June 28, 1954, adjudging the appellants guilty of contempt.

That the claim presented to the District Court in No. 33514 Civil is not the claim made by The Western Pacific Railroad Corporation in an action, No. 26508, decided by the District Court on September 6, 1949, and on appeal as No. 12506 in the United States Court of Appeals.

2. That the claim set forth in Action No. 33514 is filed by plaintiffs, not in the capacity of The Western Pacific Railroad Corporation as a taxpayer, or as the parent corporation of which The Western Pacific Railroad Company was a subsidiary, but in its capacity as an unpaid pre-reorganization creditor, and on behalf of itself and all other such creditors.

3. That the cause of action or liability, which it asserts, arises from the fact that, as has been held by the United States Court of Appeals in its judgment in No. 12506, The Western Pacific Railroad Corporation, as the parent corporation, was under a fiduciary duty to make the use of its losses and its tax credits and tax savings available to The Western Pacific Railroad Company in the interest of and for the benefit of its unpaid pre-reorganiza-

tion creditors; that all such creditors are named in the present action. That upon receipt thereof, The Western Pacific Railroad Company incurred a like fiduciary duty and obligation to the said creditors.

4. That the resulting fiduciary duty and obligation resting upon The Western Pacific Railroad Company did not arise until after the entry of the Final Order in Proceeding No. 26591, and that it is a duty or obligation covered by and included in the Assumption Agreement executed by The Western Pacific Railroad Company, and specifically assumed by said company.

/s/ LEROY R. GOODRICH,  
Attorney for Appellants.

/s/ FRANK C. NICODEMUS, JR.,  
/s/ WILLIAM MARVEL,  
Counsel.

[Endorsed]: Filed September 7, 1954.



Nos. 14501-14515

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**United States**  
**Court of Appeals**  
for the Ninth Circuit.

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WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD,  
Receiver,

*See vol. 2899* Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY,  
JAMES FOUNDATION OF NEW YORK,  
INC., and WESTERN REALTY COMPANY,  
Appellees.

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**Transcript of Record**  
**In Two Volumes**  
**Volume II**  
**(Pages 91 to 156)**

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Appeals from the United States District Court,  
Northern District of California,  
Southern Division.

**FILED**

OCT 13 1954

**PAUL P. O'BRIEN**  
CLERK



The United States District Court, Northern District  
of California, Southern Division

Nos. 33514 and 26591-S

THE WESTERN PACIFIC RAILROAD COM-  
PANY,

Debtor,

WESTERN PACIFIC RAILROAD CORPORA-  
TION and ALEXIS I. DuPONT BAYARD,  
Receiver,

Plaintiffs,

vs.

WESTERN PACIFIC RAILROAD COMPANY,  
JAMES FOUNDATION OF NEW YORK,  
INC., and WESTERN REALTY COMPANY,  
Defendants.

## REPORTER'S TRANSCRIPT

### Appearances:

For the Plaintiffs:

LEROY R. GOODRICH, ESQ.,  
FRANK C. NICODEMUS, JR., ESQ.,  
WILLIAM MARVEL, ESQ.

For the Defendants:

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE, by  
ALLAN P. MATTHEW, ESQ.,  
JAMES D. ADAMS, ESQ.

Friday, June 11, 1954—10:00 A.M.

The Clerk: In the matter of the Western Pacific Railroad Company, Order to Show Cause in Re Contempt, and Motion for Summary Judgment.

The Court: Which matter do you wish to take up first, or do you wish to take them up together?

Mr. Matthew: If agreeable to your Honor, I think we might take them up together because they are related and I think the argument as to one may naturally apply simultaneously.

Mr. Goodrich: I agree, your Honor.

The Court: Who wishes to proceed? Are you going to proceed?

Mr. Goodrich: I will, your Honor, if you wish.

The Court: All right.

Mr. Goodrich: As I think your Honor knows, there are four matters which in fact are before this Court this morning for argument and, as Mr. Matthew has already said, they are four interrelated matters. In the order of their filing, they are these:

First, a Civil Action No. 33514, which is a complaint in equity filed by the Western Pacific Railroad Corporation and by Alexis I. DuPont Bayard, Receiver, for the purpose of implementing the Decision of the Court of Appeals in this [2\*] Circuit as that Decision was determined in the Decision by Judge Byrne. This was the Decision which finally ended the action which was brought in 1946 by the plaintiff in this matter with respect to the tax matters that were before this Court.

Second, there is a petition before this Court filed

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

in May of this year under the old Bankruptcy Proceeding 26591-S, seeking an order of the Court directing the plaintiffs in the first action that I referred to, to show cause why they should not be found guilty of contempt of court by reason of the filing of this recent action.

Third, there is a motion filed by the Western Pacific Railroad Company for summary judgment on the pleadings that are now before the Court in this Action No. 33514, and a similar motion for summary judgment in its favor filed subsequently by the Railroad Corporation.

Now, your Honor, each of these matters, it seems to us, really presents a single primary question, upon the answer to which your Honor's action with respect to each of them, we think, must hinge, and I would phrase that question as being simply this:

Did or did not the Decision in Civil Action 26508 by the Court of Appeals create and depose upon the Western Pacific Railroad Company a trust liability to the unpaid creditors of the old operating company with respect to the taxes remitted [3] on account of the parent company's loss and the use of the parent company's tax credit?

Your Honor went through the long process of litigation here and is familiar with the fact that these four matters are not only interrelated but each of them harps back to and is reminiscent of questions that were raised by and during the trial by this Court and the subsequent appeal of Action 26508 which was brought by Western Pacific Railroad Corporation in 1946. That arose out of the

filing of the income tax returns, joint returns, in which the total loss of the Railroad Corporation or of its interest as the sole stockholder of the Railroad Company and its tax credit for that loss was used by the Railroad Company to effect what this Court called "an escape of taxes" which otherwise it would have had to pay in a sum exceeding seventeen million dollars.

In that action the Railroad Corporation appeared as the stockholder and the parent company in whose name the returns were made and as the owner of the tax credits which had inured—been created by its tremendous loss. That litigation, your Honor, ended at the close of 1953 with the denial of review by the Supreme Court and that denial had the effect, of course, of confirming and upholding the judgment of the Court of Appeals and of this Court. The judgment of the Court of Appeals is expressed in the opinion of the majority written by Judge Byrne. [4]

Now, may I turn to that judgment and call the Court's attention to the portion of it which we have set forth in our petition here?

Mr. Matthew: If counsel will pardon me, might I hand to the Clerk, for the Court, some papers to which reference may be made and I think that will be of aid to Mr. Goodrich?

Mr. Goodrich: Certainly.

Mr. Matthew: Pardon me (submitting documents to Clerk).

Mr. Goodrich: Thank you, Mr. Matthew.

The Court: Go right ahead.

Mr. Goodrich: I am reading just briefly now from the Decision made by Judge Byrne. That Decision says:

“The Corporation was the sole owner of the subsidiary’s capital stock. As such it was under a duty to deal fairly with the subsidiary having full regard for the interests of the creditors and holders of other securities.”

The Judge cited there Consolidated Rock Co. versus Du Bois, 312 U. S. 510, 522; and then goes on:

“It owed a duty not to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. \* \* \* If Corporation had required tribute as a condition of its co-operation, then it would have been acting with less than the required standard of fairness to the [5] subsidiary’s creditors.”

That is the ground of the Decision reached by the Court at that time.

I might say, your Honor, that I find that in the trial in this Court the same idea apparently occurred to your Honor because in the Decision in the District Court here, your Honor, after speaking of the proposal for the plaintiff in that action to share in what your Honor called “the earnings of the debtor during the period of reorganization,” you said:

“\* \* \* there is some merit to defendant’s contention that a firm obligation rested upon plaintiff to conform and co-operate to the end that the creditors and new owners should be benefited to the fullest.”

In short, in the course of the trial before the District Court the defendant here made the very contention that is expressed in the opinion of Judge Byrne in the Decision in the Court of Appeals.

Now we have to ask ourselves then, what is the meaning of this Decision in the Court of Appeals? What do these words mean?

Certainly they are words that cannot be taken in any other sense than they appear as a matter of common useage in common language, as a matter of common sense to mean. It would appear to be clear that the Decision says, first, this: [6] that as the parent corporation, the Western Pacific Railroad Corporation, was under a fiduciary duty to make its tax credits available to the Railroad Company because the subsidiary corporation had unpaid creditors, it could not, the Court seems to say, it could not in good conscience refuse the use of these tax credits so long as there remained creditors of the subsidiary whose claims were unpaid or only partially paid.

In other words, we—by “we,” I mean the plaintiff in this action—we had to make these tax savings possible and available to the operating company, says the Court, for the benefit of these unpaid or partially paid creditors.

Now is there any other meaning that could possibly be attached to those words? It seems to me not.

The Court will perhaps remember, as I said, the same idea crept into the trial of the action here and is reflected in your Honor’s comment in the Decision here in the District Court.



If the Decision by Judge Byrne means what it says, then, it seems to us, your Honor, that two consequences immediately flow from that Decision.

First, that the monies thus placed in the hands of the Railroad Company by the use of the tax credits of the parent corporation constitute a trust fund which it must devote to the payment, as far as possible, of the obligations that it still owes to the three junior creditors whose claims were [7] unsatisfied or only partially satisfied out of the assets of the Railroad Company as they stood in 1939. Those creditors were the A. C. James Company, the Western Realty Company, the Western Pacific Railroad Corporation, and in this action before the Court we have named the A. C. James Company, Western Realty Company, defendants, simply to give them an opportunity to come into Court if they desire and because all claims, if our theory of this Decision is correct, stand upon the same basis.

I think we have set forth in the complaint the extent to which the claims of these three creditors were not paid in full in the original bankruptcy proceeding. The net result is that the A. C. James Company received something like \$3,600,000 less than the full amount of its claim. The Western Realty Company had a claim of only \$60,000 and they received nothing, and, as a matter of fact, I represented them in the bankruptcy proceeding on that claim, and the Western Pacific Railroad Corporation, in addition to the complete loss of its stock, lost over \$7,000,000 in money that it had loaned to

the operating company and further loss from accommodation collateral that it had put up to secure obligations of the operating company.

All of this means, it seems to us, your Honor, that if the parent corporation was under a duty to create these savings by the use of its tax credits for the Railroad Company for the benefit of its creditors, then the Railroad Company is under a [8] like duty to use these monies saved for the benefit of those creditors.

Second, it seems clear that this Decision means that the obligation to satisfy the claims out of this fund of these unpaid or partially paid creditors is a new obligation undertaken as a matter of law and of equity by the Railroad Company upon its acceptance of the benefits of those tax savings conferred upon it by the parent corporation.

If Judge Byrne's position is sound, and it remained undisturbed on appeal, if the parent corporation was obliged as a fiduciary to provide these savings by the use of its tax credits, then the Railroad Company must in our judgment be in a like fiduciary position with respect to these creditors. Surely it cannot be as a matter of equity, your Honor, that it can accept these monies upon the ground that it has creditors and, then having accepted them, blithely decline to use them for the very purpose which Judge Byrne says compelled the parent to lend its aid to effect these savings.

The Court: What was finally decided, however, in the reorganization proceeding that the Western Pacific Corporation was not entitled to participate

in the earnings of the defendant Railroad Company during the reorganization period in Ecker against the Western Pacific.

Mr. Goodrich: Yes, your Honor, that is right, in the current operating earnings of the company. I think that is [9] correct.

The Court: What you ask for, if granted, wouldn't that be a violation of that Decision of the Supreme Court?

Mr. Goodrich: I think not, your Honor. This is a different thing altogether. These were not earnings. These were savings that were produced——

The Court: The defendant Railroad Company was the one that had to pay taxes and it had to pay taxes to the United States out of its earnings.

Mr. Goodrich: No, it paid taxes out of its gross revenues, your Honor. There is some difference between earnings and gross revenues.

The Court: Well, it had to pay taxes upon the accepted theory——

Mr. Goodrich: That's right——

The Court: ——that it had revenues which under the tax laws it had to pay taxes on.

Mr. Goodrich: On the assumption that it paid the taxes and that they had subsequently—the Government had decided that this tax claim, the claim for exemption, was good and had remitted the taxes, if it had remitted those taxes and repaid the seventeen million dollars, if it had in fact been paid to the Government and then was returned to the Railroad Corporation, as the Railroad Corporation claimed in the initial proceeding that it should be,

Judge Byrne's Decision [10] says that we would have then been under an obligation to restore that seventeen million dollars to the Railroad Company for the benefit of its creditors.

The Court: I don't quite follow you on that. Would you mind repeating that?

Mr. Goodrich: Judge Byrne's Decision says, doesn't it, that we must make our tax credit available to the Railroad Company for the benefit of its creditors? So, if the tax had wholly been paid, the entire twenty-one million dollars had been paid, and the claim made for refund of this seventeen million dollars, and the seventeen million dollars had been paid back to the Western Pacific Railroad Corporation as the taxpayer who put in the statements, the income tax statements, Judge Byrne's Decision, in our judgment, says that we would then have been obliged to turn over that seventeen million dollars to the Railroad Company because it had unpaid creditors.

The Court: Turn it over to the Railroad Company?

Mr. Goodrich: I would think so. It says that we had to make our tax credits available. Let me get (referring to memorandum)—I think I have here the entire citation:

“The Corporation was the sole owner of the subsidiary's capital stock. As such it was under a duty to deal fairly with the subsidiary having full regard for the interests of the creditors and holders of other securities. \* \* \* It owed a duty [11] not

to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. \* \* \* If Corporation had required tribute as a condition of its co-operation, then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

Well, if that doesn't mean that we either have to give the tax credits to the Railroad Company to get an exemption from taxes or asking for the exemption, restore that money to the Railroad Company if it had been paid in by them to the Government, when the Government made the settlement with us, I don't know what it means. It seems perfectly clear that what the Court is here saying is that because we were the parent corporation and under a fiduciary duty to do nothing that would be injurious to the subsidiary corporation, that we were required to use these tax credits that we had by making them available, however they might be made available, to the subsidiary corporation because it had unpaid creditors; and, if that is so, then it seems to us perfectly clear that——

The Court: Where do you get the idea that it had to do that because it had unpaid creditors?

Mr. Goodrich: That is what the Judge says. The Judge says that they are entitled to the money. [12]

The Court: That who is entitled to the money?

Mr. Goodrich: The Railroad Company.

Let me go back here.

He says we could not bargain in this matter at all. He says:

"As the subsidiary's parent company. the Cor-

poration was under a duty to deal fairly with the subsidiary having full regard for the interests of the creditors and holders of other securities. \* \* \* It owed a duty not to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. \* \* \* If the Corporation had required tribute as a condition of its co-operation, then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

The Court: Of course, that isn't just exactly what you said.

Mr. Goodrich: Well, I don't know how we could accomplish the end result that is indicated by this Decision, except either to make the tax credit available, never have paid the tax at all and set up this claim, or else if in fact the seventeen million dollars had been paid, ask for a refund, and on the same agreement with the Government that was made, get the refund and restore it to the hands of the Railroad [13] Company.

The Court: Suppose that the situation were as you hypothesized a moment ago, that the full tax was paid by the defendant company, and then on the basis of subsequent consolidated returns filed, a refund was asked for and was granted and the tax money that had been paid got into the treasury of the defendant company——

Mr. Goodrich: Then, if I understand it——

The Court: ——then would you think that under any language of the decisions of the Court the corporation would be entitled to get that money?

Mr. Goodrich: Of course, your Honor, that wasn't what was done. But what Judge Byrne says plainly is that the tax credit that we had as the result of our loss must be made available to the operating company for the benefit of its unpaid creditors.

The Court: Of course, that was one of the reasons given by the Court why it could not be claimed that there was any, of course, relationship between the corporation and the defendant which would enter into the determination of the questions as to whether or not the consolidated returns would be filed. Do you think it follows from that, that because there was that duty, that the result would be that when the recovery was made that—or, rather, when the tax saving was made that the tax saving should be turned over to the [14] plaintiff?

Mr. Goodrich: I could read no other meaning to Judge Byrne's statement.

The Court: He doesn't say that, because the case was decided against the plaintiff.

Mr. Goodrich: That's right.

The Court: He only said that would be the result.

Mr. Goodrich: That's correct, your Honor. But in that case the plaintiff was appearing as the stockholder and as the owner of the credit.

In this case now we accept the Decision of Judge Byrne, we accept the Decision that was finally confirmed and terminated in the case.

We now are in the position, the Western Pacific Railroad Corporation occupied two positions in all

of the history of this case; one was that it was the stockholder, it was the sole owner of the stock of the bankrupt corporation——

The Court: And the reorganization court determined that to be valueless.

Mr. Goodrich: That the stock was valueless. But it was also pointed out a creditor, and a not inconsiderable creditor because there was owing to the Railroad Corporation in accordance with the claim presented in the bankruptcy proceeding more than seven million dollars and that has never been paid, the still creditor—— [15]

The Court: Is this suit that you are bringing now in the nature of a suit on behalf of the creditors to participate in this matter, because of the fact that there is no other relief or could be none in the reorganization proceeding and that now the creditors feel that they should have a further participation in the earnings of the defendant company?

Mr. Goodrich: No, your Honor. What we think is that the Decision of Judge Byrne's, the Decision that Judge Byrne makes, is simply that this fund—that we were obligated to remit the consolidated returns, the use of our loss for the purpose of getting a tax credit, with the Federal Government, the use of that tax credit, so that the Railroad Company might possess this seventeen million dollars which your Honor labeled “a tax escape”—I think perhaps rightly—in the original proceedings in this Court.

The Court: They didn't think much of that.



Mr. Goodrich: And said we must do so because the company had unpaid creditors.

The Court: What I am trying to find out, Mr. Goodrich, is this, that I don't see how there would be the slightest merit to the suit. As a matter of fact, I would be inclined to think it would be a vexatious suit if all it was was a suit just brought by the same person against—and whose claim has been decided adversely. No matter what theory you are bringing it under, the case was in Court and the Western [16] Pacific Railroad Corporation was denied relief and the case was decided against it. And if you are now trying to use some of the language in the opinions as to some of the reasons given for that judgment as the basis for bringing another suit on the same subject matter, why then I would think there couldn't possibly be the slightest merit to it.

I am just wondering whether or not what your theory is, is that the creditors of the Western Pacific Railroad Company are bringing some sort of an action in equity because of the fact they haven't got any other way of getting relief which they might now be entitled to as creditors because of the fact that the reorganization proceeding having finally disposed of all those matters is the final ending of the matter and that upon some new theory the creditors, after all that has happened, are now in a position and think that there is something they can now assert because some reason is given for the decision by some of the judges in their opinions in the matter.

I would take it that is not your position. I mean, at least I am not sure. But I have read the complaint and it does not seem to be the position of the plaintiff.

Mr. Goodrich: Well——

The Court: This is solely a suit, isn't it, by the Western Pacific Railroad Corporation on its own behalf to get——

Mr. Goodrich: And for the benefit of the other creditors. [17]

The Court: Does it say that?

Mr. Goodrich: We have stated that, that we made them defendants in this action for that purpose to bring them herein.

The Court: These are the only other creditors?

Mr. Goodrich: There are——

The Court: The only creditors, the original creditors of the Western Pacific Railroad Company in the reorganization—at the time of the reorganization?

Mr. Goodrich: They are not the only other creditors. They are the only other creditors whose claims were not satisfied in full by the Plan of Reorganization. The A. C. James Company claim was satisfied in part but not in full. The claim of the Western Realty Company was not satisfied to any extent; nor was the claim, of course, of the Western Pacific Railroad Corporation. [18]

Now, if our understanding of this Decision is correct, that we were obligated to make these tax credits available to the company in order that these tax savings might be effected because it had credi-

tors, as Judge Byrne puts it, then it seems to us that those tax savings, having been saved by the use of these tax credits which the parent company had to turn over to the Company, constituted a trust fund for the benefit of these unpaid creditors.

The Court: What you are saying is that there are some earnings of the Western Pacific Railroad Company that have somehow or other become a trust fund for the Western Pacific Railroad Corporation and the James Foundation and the Western Realty Company?

Mr. Goodrich: Well, that is it, that is what we feel is the purport; that is why we are here in Court, to ask this Court whether that is not what this Decision really says.

The Court: How can you get around the final decision in the reorganization proceeding, that you are not entitled to participate? The Court didn't make any distinction on it. You just weren't entitled to participate in those earnings.

Mr. Goodrich: As the stockholder and as the owner of the loss that we were not entitled to participate. But there was no question raised in those proceedings at all about the fate of these unpaid creditors or their right to participate in these savings if they were made or until the decision of [19] Judge Byrne, the duty of the Railroad Corporation——

The Court: What was the amount of the Western Pacific Railroad Corporation's claim as a creditor?

Mr. Goodrich: What was the amount of it?

The Court: Yes. Do you happen to know that, aside from its claim as a stockholder?

Mr. Goodrich: The Western Pacific Corporation claim as a creditor unpaid was \$7,609,370, set forth in our complaint.

The Court: Well, then, what you are saying is that \$7,000,000 of the earnings of the Western Pacific Company should go to the Western Pacific Railroad Corporation?

Mr. Goodrich: And there was, I think, a total of \$6,249,750 to A. C. James Company, but the unliquidated balance that we have set forth in the complaint here is \$3,683,175.

Those are the correct figures, I think.

Mr. Nicodemus: I think so, yes.

Mr. Goodrich: Here were three creditors whose claims had not been paid in full. True, they could not be under the reorganization proceeding because of the valuation found on the Railroad properties for the Railroad Company itself. There was not enough available to satisfy all of the creditors, and the bondholders were first paid off under the Plan proposed by the Interstate Commerce Commission.

Next, the Reconstruction Finance Corporation was paid under [20] a similar plan—under the same plan. Next, the Railroad Credit Corporation was paid. Finally, the A. C. James Company, the fourth creditor in line, was paid in part but not in full. The Western Realty Company, the fifth in line, with its small claim of \$60,000, was paid nothing. And there was nothing left for the Western Pacific Railroad Corporation as the stockholder nor on account

of its claim for monies advanced to and for the Railroad Company prior to the institution of the bankruptcy proceedings.

Here were left three creditors whose claims had been unpaid and we can read no meaning into the language of the Decision except that this Corporation was under a fiduciary duty to make its tax credits available to the Railroad Company, and it performed that duty. The tax credits were used for the purpose of saving this total amount of seventeen million dollars, which in fact was done.

If the duty arose from the fact that there were unpaid creditors, then it seems to us that these unpaid creditors now have under the new obligation imposed on the Company by this Decision the right to come into Court and ask this Court whether the Decision of Judge Byrne means actually what it says, whether there is now created this trust liability upon the Railroad Company, and that's all.

The Court: But the opinion, the judgment of the Court, specifically in the Court of Appeals, to the effect that the [21] benefit of the tax saving could not and should not inure to the benefit of the Western Pacific Railroad Corporation. It says so in so many words.

Mr. Goodrich: That's right, as the stockholder, your Honor. But we are not appearing here as a stockholder. We recognize that Decision. As a stockholder the Western Pacific Corporation would have no position in this Court whatever. Our stock interest was wiped out. We lost it completely. \$75,000,000 loss. But we were still a creditor. A stock-

holder of a corporation might lose all of its stock in the corporation——

The Court: Are you any different——

Mr. Goodrich: ——but is still a creditor.

The Court: Are you any different than any other creditor whose interests are finally determined in a reorganization proceeding? Let's assume that you haven't got this long drawn out litigation that we had here and you are just a creditor of the Western Pacific Corporation today—and the Western Pacific Railroad Company today—and you look back over the records and you find something that some judge said about it in some litigation, and the reorganization proceeding has been fully closed and concluded and everybody's rights determined. Do you think a creditor can come in and file a suit against the reorganized company? What would be the basis for that? There never would be an end to litigation [22] if that were so.

I don't care what the theory is. If you are a creditor, as you were, then are you in any different position than any other creditor in the case of a reorganization proceeding that has been finally closed and concluded and run the gamut of all of the courts, finally ended, and you haven't got your claim satisfied?

Now you come in as a creditor and again litigate the matter by filing some kind of a suit because somebody else thought they had a claim against the corporation on another theory and were defeated in that claim, and some place in that Decision some judge made some comment of some kind in connec-

tion with the arguments or the basis of the Decision on the subject matter.

He wasn't considering there the question of whether a creditor could come in and file a suit again in the future in this closed transaction. So, are you in any different position than any other creditor in the case of a reorganization proceeding? Isn't that so?

Well, what rights do you have as a—suppose you were, instead of being the Western Pacific Railroad Corporation, you were John Smith who had a claim for personal injuries against the Railroad Company in the sum of \$25,000 and he got wiped out in the reorganization proceeding and it was all ended, and John Smith being of an inquiring turn of mind [23] and having some interest in legal proceedings, read the Decisions of Judge Goodman and Judge Byrne and all the rest of them in this proceeding, and he said to himself: Well, now, maybe I can come along and get my claim satisfied now in this case because I have discovered that the judge said something about a trust fund there in this other litigation, and they got some tax savings there that benefited them, increased their earnings, or by which their earnings were increased, so I am going to come along now and ask the Court to satisfy my claim of \$25,000 out of these earnings, because of the opinion in the case. Something was said in the opinions in this other piece of litigation that went on.

I mean, I don't think your position, Western Pacific Railroad Corporation, because it is a Corporation, would be any different than Smith or

Jones or anybody else that had a claim against the Corporation. Would it? Would it be in any different position?

Mr. Goodrich: Yes.

The Court: You say that your claim is based solely upon your position as a creditor?

Mr. Goodrich: Well, isn't the answer to that that the only creditors who were involved at the end of that bankruptcy proceeding were the creditors who had filed their claims at the initiation of those proceedings? Any people who had claims against the Corporation during the period of the [24] operation of the Railroad by the trustees had their claims satisfied of course.

The Court: I am referring to a creditor that had a claim that was in existence at the time of the reorganization proceeding, when it started and who had a position as a creditor—not as a creditor during the course of operations under the reorganization, but an antecedent creditor, and he had a claim, and he held a note from the company, some kind of a credit. Now, could he come in now with this kind of a suit on the strength of this proceeding that was started by the Western Pacific Railroad Corporation to share in the so-called tax savings, which to me was always, has always been a misnomer in the case, but nevertheless that is the way they have always spoken of it, could he come in now because of this other kind of a proceeding which had nothing to do with the position as a creditor of the company and because of something that was said and which he interprets in a certain



way was said by some judge in that proceeding, could he come in and now reassert his claim as a creditor of the corporation, which has already been adjudicated, on some trust fund theory such as you have urged?

Mr. Goodrich: Well, now let's see when he became a creditor, your Honor. These three creditors were a part of a list of a total of seven, I think, the bondholder, the Reconstruction Finance Corporation, the Railroad Credit [25] Corporation, the A. C. James Company, the Western Realty Company, and the Western Pacific Railroad Corporation, were seven creditors in the bankruptcy proceedings.

The first four of those creditors had their claims paid. The A. C. James Company was paid in part and in part it was not. The Western Realty Company was not paid. The Western Pacific Railroad Corporation was not paid.

Now you are assuming an eighth creditor somewhere. He could not be a person who was a creditor at the initiation of those bankruptcy proceedings. He would have to be a creditor of the corporation whose claim against the corporation had begun in the period of the operation of the company under the jurisdiction of this Court and in the hands of the trustees and his claim would have been paid—it would be a legitimate claim.

The Court: That isn't what I mean.

Mr. Goodrich: How could you have another creditor?

The Court: I am not talking about somebody

whose claim might have to be a claim in the reorganization proceeding. The Western Pacific Railroad Corporation's claim, as I understand it, unless I am in error—you correct me on that—was a claim against the Railroad Company that antedated the reorganization proceedings.

Mr. Goodrich: That's right.

The Court: That's right. [26]

Mr. Goodrich: That's right.

The Court: So it doesn't make any difference who that creditor is, whether it is John Jones who has another kind of a claim or not. In principle, what you have to meet is whether or not an antecedent creditor of the—prior to reorganization—can now come in and file this kind of a suit because of something that was said by a court in a case that involved an entirely different question as between the holding company and its subsidiary corporation and had nothing to do with the claims of creditors who antedated the reorganization proceeding.

So let's forget—let's not call this a suit by the Western Pacific Railroad Corporation. Let's call this a suit by John Smith——

Mr. Goodrich: Yes.

The Court: ——to whom the Western Pacific Railroad Company owed money.

Mr. Goodrich: When?

The Court: Prior to the initiation of the reorganization proceedings.

Mr. Goodrich: And are we to assume then that John Smith filed a claim in the bankruptcy proceedings?

The Court: He filed a claim—The Western Pacific Railroad Corporation filed a claim, didn't it?

Mr. Goodrich: That's right. [27]

The Court: He filed a claim and it was not satisfied. And it was not satisfied when the reorganization was completed, and so he had an unsatisfied claim, and he was wiped out in the reorganization proceeding.

Now along comes—this is John Smith now—along comes the Western Pacific Railroad Corporation and it evolves this very novel claim that it ought to get this nineteen million or seventeen million in tax savings because of the so-called joint returns, consolidated returns.

And that litigation runs through all the gamuts of the court and the Western Pacific Railroad Corporation loses out on it.

Now, what benefit is that, what solace is that to Mr. John Smith who had a claim, how can he in any way advantage himself of anything in that litigation to now say that his claim was wiped out—John Smith's claim was wiped out in the reorganization proceeding—has now some sort of a new club to it and mysteriously by the language of some judge there has been established a trust fund and now John Smith can come in a suit and get his claim paid?

Mr. Goodrich: Well, your Honor, under that supposition, isn't John Smith simply another name for either the Western Realty Company or the A. C. James Company?

The Court: What I was trying to do—I won't

interrupt you any further—all I was trying to do was disassociate [28] the names from principle. That is all.

Mr. Goodrich: I see.

The Court: I was simply trying to paint a picture of whether or not there is any merit at all as a matter of law in the action that is filed here. In order to do that, we simply have forgotten the names and have simply taken Mr. Smith, who is a creditor, and see whether he could maintain this action.

Mr. Goodrich: Well, now——

The Court: That is what I had in mind.

Mr. Goodrich: All right. Perhaps I haven't made perfectly clear what we are seeking here. It is not, of course, the same thing as the claim that was involved in the preceding litigation where as a stockholder and as the owner of the tax credits we felt that the money saved belonged to the parent company.

That question is gone. That was decided against us. There is no doubt about that at all. But what we feel now is that under the language of this Decision this money in the hands of the Railroad Company, since we had to make it possible for the money to exist in the hands of the Railroad Company by a tax credit and a tax saving, is in the nature of a trust fund for the benefit of the creditors.

The A. C. James Company could be John Smith. The Western Realty Company could be John Smith. Or if they had [29] filed a similar petition, we then would be in a position, I suppose, of John Smith.

We are not claiming that this \$17,000,000 belongs to the Western Pacific Railroad Corporation. We grant that under the Decision of the Court it does not belong to the Western Pacific Railroad Corporation as a stockholder and as the owner of that tax loss.

But Judge Byrne says we had to consent to the use of these tax credits by the operating company in order that the tax savings might be effected—tax saving which your Honor said—you couldn't even see that they were entitled to, that perhaps they really belonged to the United States Government.

Now they were made and they were made by the process of our giving the benefit of our tax credits to the operating company. We think, therefore, that if that is true, if that is why we gave the credits, if as a matter of law we were required to do it because there were unpaid creditors, then the creditors, not just the Western Pacific Railroad Corporation, the creditors, whoever they are that were unpaid, the very creditors that Judge Byrne was talking about—he was not talking about creditors whose claims arose during the bankruptcy proceedings, he was talking about the unpaid creditors whose claims were filed in the bankruptcy proceeding and whose claims predated 1939—he says we were obliged to make these credits available for the benefit of those [30] creditors, and we think that this fund should now properly be used exactly as Judge Byrne apparently expected that they would be used, for the benefit of those creditors.

It should be regarded as a trust fund and their claims be paid. [30-A]

The Court: The Circuit Court didn't have any power to make any order with respect to what would happen to the earnings of this corporation. All they decided was whether or not the defendant was entitled to recover in the action. They decided it was. There wasn't any reorganization court that was hearing the matter. There is no jurisdiction, of course, to determine what should be done with any of the earnings of the company. I don't see the point to that at all.

Mr. Goodrich: That is why we had to bring this action. We have got to find out what this decision means, what effect it has, if anything, on the creditors. Are these creditors or are they not entitled by reason of this decision on the new obligation? It is just as if, your Honor, one of these people, anybody—I make available to somebody some property that I have to help satisfy his obligations to somebody else. If I give him the money, he holds it as a trustee, and he is under obligation to pay it to the person for whom I intended. Now this money apparently was made available by the parent corporation because it was a fiduciary, Judge Byrne says, it had to be made available, he says, to the railroad company, because of the fiduciary relationship, because the railroad company had these unpaid creditors.

Well, then, if the creditors are the reason why the credit had to be turned over to the railroad company and the savings left with them, then they

must be the beneficiaries of that [31] fund. That is all. We are not asking that we be paid \$17,000,000, or that we receive the proceeds of this fund. The purpose of this action is to ask the Court for an interpretation of this decision and a decision as to whether this fund should not be held as a trust fund and the claim, the unpaid amounts of these claims now paid by reason of the new obligation, not the old one, but the new obligation incurred when we turned over those tax credits.

The Court: Well, of course, if the Court determined that this was a trust fund to be held for the benefit of the creditors, you might have some further proceedings, in the matter. But there is no decision of the Court of Appeals that this was a trust fund. They never decided any such thing as that at all. All they decided was the plaintiff was not entitled to recover in the matter. One of the reasons that they gave for it was that there was no right in law for any recovery on the part of the plaintiff in the other action because its actions were the result not of any contractual situation that would entitle them to a recompense but was simply pursuant to some duty that existed on their part. That's all.

And that being so, that there was no cause of action in the complaint. And I don't see how—there is no decision of the Court here—I didn't read anything to the effect there was a trust fund, that the money recovered was a trust fund for the benefit of any creditors. It doesn't say so there. [32] And if it did, it would be the purest dictum because it

wasn't a matter that was before the Court for adjudication at all.

I see what your argument is, Mr. Goodrich, but I hope you will excuse me for asking you these questions and arguing with you. It helps me to understand, to see that I understand what you have in mind.

Mr. Goodrich: Well, I would like to make that position perfectly clear to your Honor because there is a marked distinction between the position of the Western Pacific Railroad Corporation as a stockholder in the preceding litigation and its position now. It has no right whatever—it did have no right according to the decision of the Court to participate in these tax savings because it was a stockholder or because it was the owner of the credit with the United States Government.

But the reason that Judge Byrne assigns why it could not as a stockholder and the owner of the credit obtain this \$17,000,000 is that it was under a duty as a fiduciary to provide that money to the railroad company because the railroad company had unpaid creditors and those unpaid creditors could only be—couldn't include anybody else, whether we designate any of them as John Smith or by the true name—it could only be the three creditors that we have named in the complaint here. We brought the other two in simply for the purpose of making it perfectly clear to the Court the sole [33] purpose of this action, whether it was determined whether there is now under Judge Byrne's decision a trust obligation in that fund resting upon the railroad



company so that out of the fund so far as it may be possible to do it, the claims of those unsatisfied creditors may now be met.

The railroad company here has asked the railroad corporation be held in contempt of court. I might say, your Honor, I think you probably know that as a result of the terrific loss which it took in this bankruptcy proceeding and the loss of the stock, the Western Pacific Railroad Corporation is itself in the hands of a receiver in Delaware. Its affairs are in charge of the chancellor there; Mr. Alexis I. DuPont Bayard, who incidentally is a very eminent lawyer in the State of Delaware, is a receiver of the corporation. It was his judgment—it was the judgment of the attorney for the receiver, Mr. Marvel, Mr. Nicodemus, that here was at least a judicable question to be brought before this court as to whether this wording in that decision means just what it says. Perhaps it does not. But surely the receiver could not be in the position of neglecting any opportunity, if as a creditor the corporation was entitled to be paid out of this apparent trust fund, to seek the judgment of this court as to whether that interpretation is correct or not. I don't think that there is any contempt in the matter of that kind. As a matter of fact, this would not be, if our view of Judge Byrne's [34] decision is correct. This is not an obligation that would bar in any way by the final order of the Court. It would be in the nature of an obligation assumed by the railroad company under the Assumption Agreement here, because it would be a new agreement. We don't

appear before this court in contempt of the court, and certainly we are not asking this court to in any way violate the decisions that were made heretofore in this action. We can't do that. This plaintiff is here not to ask that the same remedy be given to it as a stockholder that was denied in the previous proceedings. We could not do that, your Honor, and would not do that.

But Judge Byrne says we had to make these tax credits available to this company for the purpose of saving these tax savings because it had creditors, and the railroad company itself advanced the identical argument in the initial proceedings, and, as I cited to your Honor, you made the comment that there seemed to be something in that contention.

Now, if we are correct, the railroad company here, it raises the, as it did in the preceding proceeding, the group of objections, they claim this is *res judicata*, they argue that there are laches and barred by the final order, and an examination of the final order would not reveal any such bar. They say the statutes of limitations apply. If our view of Judge Byrne's decision is correct and the consequences flowing from it, then a trust fund is created and the statutes of [35] limitations do not apply to that. A discharge in bankruptcy would not even apply to it. A discharge in bankruptcy is neither a payment nor an extinguishment of a debt, your Honor. It is merely a bar to the enforcement of the debt by legal proceedings. It neither destroys the debt nor supplants the moral obligation upon which the debt rests. The debt remains unpaid and in existence

after the discharge in bankruptcy so that security that is given for it may be available by the creditor, if he has any security, and if a new promise is made to pay the debt, that is a sufficient consideration.

Now a discharge in bankruptcy would not affect this matter as we are presenting it to the Court. Of course, the old claim is gone. That was wiped out by the decision in the 1946 proceedings, as I call them, the long period of litigation which ended in the confirmation of this Court's opinion. But this is a new claim which we are presenting to the Court, asking for its interpretation of Judge Byrne's decision, and when he says that we must turn over those tax savings because this railroad company had unpaid creditors, we can assume only that he means the unpaid pre-reorganization creditors in existence at that time, and that when they received the money it was in trust at least for the payment of the unpaid balance on those claims.

Whatever the residue that might be left, if any, afterward, that is a different question altogether. But here we [36] are presenting only the question of the correct interpretation of this decision and its effect on this fund which we can't help but feel if the Judge was correct that its basis is in the nature of a trust fund to be used for the satisfaction of the balance of these unpaid claims, it is a new thing, a new obligation created altogether, not an old one.

Are there any other questions, your Honor?

The Court: All right.

Mr. Matthew: May it please the Court, I think initially I should answer what counsel has said

about what he terms a construction or a determination in Judge Byrne's opinion. Your Honor will recall that two or three times counsel for the plaintiffs has referred to "unpaid creditors." Judge Byrne said nothing about "unpaid creditors."

May we go to that for just a moment? I have before me this little pamphlet which includes both your Honor's opinion and the opinion of the Court of Appeals, and I am turning to page 34 and page 35. First, I call your Honor's attention to the introductory sentence of the paragraph from which Mr. Goodrich has in part quoted. This is toward the bottom of page 34:

"However, it is contended that the subsidiary should have notified the Corporation's stockholders and directors of the filing of consolidated returns so that independent directors and officers could [37] have been put in charge of Corporation's interests to make a bargain with the subsidiaries and obtain compensation as a prerequisite to filing consolidated returns. There are several things wrong with this argument. The most obvious is that the entire transaction was open and above board."

From that point on, Judge Byrne proceeds to point out wherein the argument is wrong. He is replying to that particular argument and is disposing of it.

Now when he comes to the text, and which Mr. Goodrich did quote, and which is quoted in the complaint in this case, mentioned about line 6 on page 35:

"The Corporation was the sole owner of the sub-

subsidiary's capital stock. As such it was under a duty to deal fairly with the subsidiary having full regard for the interests of the creditors and holders of other securities."

Nothing is said about "unpaid creditors." That is all I need to say there. That is the only sentence in which the word "creditors" is noted.

Certainly there is nothing in the text of this paragraph, nothing in Judge Byrne's opinion, which is susceptible of being translated into what my adversary has suggested, that Judge Byrne was holding or undertaking to hold that here a trust fund was created, was called into being, was in the [38] possession of this reorganized railroad company so-called trustee custodian, and which now must be paid over to the unpaid creditors. He said nothing about the "unpaid creditors" at all. He said nothing about a trust fund and there is nothing in what he has said that he imports that.

Counsel also called attention to the fact that Judge Byrne in what he said there was speaking largely in accordance with what your Honor said in your Honor's opinion. I think he is right in that. We go back to page 15 of this pamphlet where we have your Honor's opinion, and just below the middle of the page there is a sentence which Mr. Goodrich quoted. I will quote it again:

"Indeed there is some merit to defendant's contention that a firm obligation rested upon plaintiff to conform and co-operate to the end that the creditors and new owners should be benefited to the fullest."

That I think is a little more correct statement of just what Judge Byrne had in mind and what he was saying was merely an approval of what this court had said, and indeed there is no reference to "unpaid creditors." They speak of "creditors" and of "new owners" and the new owners are largely the old creditors which were allowed to participate in the Plan.

There are obviously three things wrong with that particular contention on the part of our adversaries. In the first place, [39] Judge Byrne did not say what apparently has been attributed to him. He said nothing suggesting that a trust fund had come into existence to satisfy the unpaid creditors. Nothing whatever.

The second is that Judge Byrne—I should rather say, the Court of Appeals did not purport to make findings of its own. It could not do so. What it did actually was to approve the findings of this court without modification at all.

And third and finally, the judgment of this court was affirmed and without the slightest modification.

I have handed to the Court and counsel a copy of that judgment, so there will be no question about it. This amended judgment, second paragraph, recites:

"It is by the Court Ordered, Adjudged and De-  
creed that the plaintiffs, The Western Pacific Rail-  
road Corporation and Alexis I. duP. Bayard, Re-  
ceiver, be denied all relief, and that the interveners  
be denied all relief, and that the plaintiffs recover

nothing and that the interveners recover nothing from the defendants or any of them.”

That they receive nothing. That’s the judgment. They receive nothing. That should dispose of the contention predicated upon what counsel has termed Judge Byrne’s decision.

It is not a decision. It is really a statement of the [40] course of reason and does not have the effect that counsel seeks to attribute to it and, of course, it could not have that effect.

Counsel finally observed in the course of his argument, and I think I can almost quote this directly, he said: There is a marked distinction between the status of the Western Railroad Corporation as a stockholder and its status as a creditor. That’s about his language. Then he went on to say: Of course, the Western Pacific Railroad Corporation was bound by the results reached in the suit before your Honor in which it was held that the corporation and the receiver should take nothing.

But he says that simply concluded it as a stockholder and they still have a claim as a creditor.

Assume that is true for the moment. But, as your Honor pointed out in the inquiries which came from the bench this morning, what was his status as a creditor? Was it an antecedent creditor? It was such an antecedent creditor and is bringing this suit here for the purpose of recovering some seven millions of dollars and more upon a claim which is at least eighteen years of age and more because it was based upon an indebtedness incurred prior to the petition for reorganization on August 2, 1935,

and that will have its nineteenth birthday in August of this year.

Now only so, but that claim was held valueless in the [41] reorganization proceeding. It was ordered cancelled and discharged, it was cancelled and discharged, it has been dead and buried for some ten years and it is beyond the possibility of resurrection now, and being made the basis of this suit.

In order there can be no possible misunderstanding as to the status of that claim, and I repeat it was an antecedent claim, I have excerpted from the order of the Interstate Commerce Commission prescribing this reorganization plan, what the Commission said both about this claim of the Western Pacific Railroad Corporation as a stockholder and its claim as a creditor, and a copy has been handed to your Honor, this single sheet, and a copy has been handed to counsel.

On it, and from it we can see whether the claim is really any different.

First, under subdivision P, paragraph 6—I am now quoting:

“The unsecured claims of the Western Pacific Railroad Corporation and the Western Realty Company, and other unsecured claims not entitled to priority over existing mortgages, are found to be without value, and no securities or cash shall be distributed under the Plan in respect of these claims.”

So the claim is held to be without value.

Now we proceed to subdivision R, which reads as follows: [42]



“The capital stock of the debtor and the unsecured claims against the debtor not entitled to priority over existing mortgages shall be cancelled.”

So the stock was held valueless, and the Western Pacific claim as a creditor was held valueless. The claim was ordered to be cancelled, and it was cancelled.

Now the reorganization proceeding, which lasted over ten years, that reorganization plan, as your Honor knows, was approved in the first instance by order of Judge St. Sure sitting in the proceeding. There was an appeal. The Court of Appeals reversed and the Supreme Court granted certiorari. In March of 1943 the Supreme Court reversed the Circuit Court and approved the order made by the District Court upholding the plan.

That plan, as I have stated to your Honor and made clear by this little excerpt, held the corporation's claim valueless and ordered it cancelled, and the Supreme Court approved it.

In the fall of that same year, the District Court again, through Judge St. Sure, made an order confirming the plan and no appeal was taken of that order. That should be enough.

When that plan was confirmed as the plan that should be submitted to the creditors which actually was accepted and finally consummated, that was the end of that claim because [43] it was held valueless in that reorganization proceeding.

Now that isn't all. I don't know how far your Honor will expect me to carry this. But we pass along to the time Judge St. Sure made his reconst-

ment order, which I think was in the fall of 1944. That order was made November 27, 1944:

“Order directing the revesting of properties of the debtor in the reorganization company free and clear of all claims except such as have been specifically approved \* \* \*”

Now this order included the requirement that the reorganization committee execute an assumption agreement did not require the assumption of pre-reorganized claims, such as this, against the debtor company or of unsecured claims which were cancelled and discharged. On the contrary, it expressly withheld authority to pay such unsecured claims. And I come to that now, although probably is isn't necessary, but since I have purported to rely upon the assumption agreement to pass upon this supposed liability to the reorganized company, the Court should know that was not the purpose or intent of the assumption agreement but was expressly forbidden by the order of the Court itself. That proviso reads as follows:

“\* \* \* provided, however, that this order shall not be construed as a modification of any former orders of this court barring or settling [44] claims against the debtor or the debtor's Trustees, and said Railroad Company shall assume only the valid and outstanding obligations and liabilities of the debtor or the debtor's Trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged, and only such obligations and liabilities as are preserved under the plan of reorganization and are not limited

or discharged by the prior orders of this court.”

So as of that it is perfectly clear now only that this claim of \$7,000,000 which the railroad corporation is now attempting to make the subject of this suit, this new suit, that claim has been dead and buried so long that I am at a loss to understand how even my rather persistent friend on the opposition can see any occasion for attempting to bring suit upon it. The claim has not only been discharged but I say has been interned so long that it cannot be resurrected for any purpose.

The difficulty with my adversary's case is this—it is directed to two objectives, neither of which is possible of attainment. The first is to recover upon this antecedent claim of the Western Pacific Railroad Corporation against the old debtor company, which was cancelled and discharged in the reorganization proceeding. Now that is impossible and yet that [45] is frankly avowed in the complaint, and they say, because they are intrigued by what Judge Byrne said, in that opinion they find some kind of a trust fund and then and therefore that trust fund is now available to satisfy the unpaid claims of antecedent creditors even though those claims have been wiped out. I can't follow that line of reasoning at all. That is not the effect of a proceeding in bankruptcy.

In that connection, I would like just briefly to bring to your Honor's attention something that was said in your Honor's opinion which I think effectively disposes of at least a large part of my adversary's argument. This is on page 15 of this little

pamphlet, with the brown cover—I will read just one paragraph, if I may, the last paragraph on the page—page 14:

“When it was finally determined, after running the full gamut of court and administrative procedure, in the reorganization of the Western Pacific Railroad Company, that the plaintiff’s interest was worthless, nothing short of some extraordinary cause justifying reopening the reorganization proceeding could effect a change. To make any award in this cause, under the assumed authority of equity principles, would be in effect to modify the administrative and judicial judgments in the reorganization proceeding. Such a procedure would be an indirect nullification of the purpose of the [46] reorganization statute, in the guise of an afterthought allegedly of equitable persuasion.”

Your Honor was there addressing himself to the claim of these so-called tax savings in the suit which was before your Honor for so long. But that language is equally pertinent to the claim of this Western Pacific Railroad Corporation as a creditor, particularly when that claim has been held valueless and has been in fact cancelled and discharged.

I have said that the first objective is impossible of attainment because the decrees in the reorganization proceeding prevent it and in fact forbid it. Now the second objective is to obtain something in the nature of a retrial of the so-called tax savings case. [47]

It is difficult for me to understand how counsel can concede, as he did this morning, that the Cor-

poration and the Receiver are precluded by the Decision in that case as he has said, and yet to declare in the Return to this Order to Show Cause that is essentially an identical action.

I know your Honor has before him the Respondents' Return to the Order to Show Cause. It is a sheet of paper only. I wish to deal with it a little more fully a little later on.

I refer at the moment to the second paragraph that reads as follows:

“Said successoral action was brought by respondents to implement a determination of the Court of Appeals in the Ninth Circuit in an earlier and substantially identical action brought by them under said Assumption Agreement, by providing a machinery or medium for the administration of a trust resulting therefrom in respect of a fund of \$17,201,739 in the custody of the defendant Railroad Company but held by it subject to all of its obligations under said Assumption Agreement.”

To my mind that is a very curious representation. That fund of \$17,201,739 will be familiar to your Honor. That is the rotund sum which our adversaries were suing in the tax litigation case, the so-called tax saving. And here it is [48] recited in this Return that that is a “substantially identical action” with the present action.

Well, if these two actions are substantially identical, it would seem basically clear that the judgment entered by your Honor in that case and which was approved by the Circuit Court of Appeals and which the Supreme Court of the United States refused to

disturb *res judicata* respecting all issues raised in that substantially identical action.

I will come back to this a little later. Perhaps as long as we have come to it, I will deal with it a little further, if your Honor please, because I am thoroughly dissatisfied with this Return. It is not responsive by any means to our petition for Order to Show Cause. I think it is highly misleading.

Now, the first paragraph is as follows:

“The successoral action commenced by the respondents in this Court being Civil Action No. 33514, was brought against the defendant Western Pacific Railroad Company under the Assumption Agreement executed by the defendant Western Pacific Railroad Company as required by said final order to enforce a valid and subsisting liability of the reorganization Trustees which was transferred to the reorganized Western Pacific Railroad Company; and it is an [49] excepted action provided for and contemplated by said final decree of March 28, 1948, and in no respects violative thereof.”

Well, if your Honor please, I think counsel defined it very clearly to your Honor that this is an effort to recover upon that antecedent claim, the claim of the corporation as a creditor against the old debtor company.

That claim never became a liability of the reorganization trustees, and could not have become a debt of the reorganization trustees. It could not have been carried forward and imposed upon the reorganized company. The Assumption Agreement did not require the reorganized company to assume

these antecedent claims against the old debtor company.

On the contrary, I point out to your Honor that the order of Court forbade that, and yet it is set forth in that first paragraph of this Return, that this was brought upon a claim to enforce a valid and subsisting liability of the reorganization trustees.

I submit to your Honor that that representation is not in conformity with what is in the complaint itself.

I refer to the second paragraph. As regards the first paragraph, I think I need say nothing about that or about what counsel has stated to your Honor in that connection, beyond this, that it does not appear, so far as I know, that the Chancery Court in Delaware specifically authorized the [50] institution of this particular complaint. Nothing was shown that it has. I assume that in making this Return upon what is based the general authority of the Chancery Court, that is not a matter of moment in any event.

If an action is brought which is in fact contemptuous, it is contempt no matter upon whose order it is in this Court.

I think I have said enough about the reorganization proceeding which, as I have told your Honor was brought to a conclusion by the final order of March 28, 1946. I did refer to the injunctive proceedings in the prior revestment order, but the final order contains injunctive positions just as distinct, and I am quoting briefly from paragraph six of this

final order, and a copy of that has been handed to your Honor and likewise pleaded in our petition. These are injunctive provisions which prohibited the institution of suit against the reorganized company, and I am quoting:

“\* \* \* on account of or based upon any right, claims, or interest of any kind or nature whatsoever which any such persons, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), \* \* \*”

Certainly suit upon this claim which was an antecedent [51] claim which existed before August 2, 1944—was certainly a claim effected on or before August 2, 1944, and the injunctive proceedings forbid the institution of this suit.

I can say little more, I think, respecting what was set forth in our petition for an Order to Show Cause why the Western Pacific Railroad Corporation and the Receiver should not be adjudged guilty of contempt for instituting this suit which was directly in conflict with the injunctive provisions which I just brought to the attention of the Court.

I intended to say something more than now appears to be necessary respecting the tax saving suit, as it has been called. Your Honor is thoroughly familiar with it. That litigation carried over more than seven years. Your Honor knows there was a protracted trial here. Your Honor is familiar with the judgment entered. The Circuit Court affirmed it. The Supreme Court refused to disturb it, and



ever since that time that judgment has been final. It is beyond challenge anywhere and it is *res judicata* of any claim directed to the revenue of the trustees, so-called tax savings, which is the subject of the complaint in that proceeding.

The filing of this complaint is a strange act of these two prolonged pieces of litigation in the reorganization proceeding and before your Honor. I intended or I would be tempted to review that bill of complaint rather fully but I [52] gather your Honor has read it and I think I need not say more than has already been developed in connection with it.

The only thing that is new in that complaint at all is the attempted use of those few sentences in Judge Byrne's Opinion, with the extraordinary contention of my adversary—importing the “unpaid” continuously—that it is in his behalf a ruling that a trust fund has been created which now may be used in part at least to pay off claims eighteen years old or more which were held valueless and which were ordered cancelled and discharged in the reorganization proceeding. [53]

When a claim is cancelled and discharged, it is through. I don't know whether I have to say that any more than I have said it. But it is beyond my ability to understand how our adversaries can now come before this court and sue upon a claim which was held valueless in the reorganization proceeding and which by order of court itself was required to be released and cancelled and discharged.

When a claim is cancelled, discharged, it doesn't

exist any longer. And that is one of the objectives of this suit. But one would never guess that objective is in this suit upon reading the return. Nothing whatever is said about this suit to recover this \$7,000,000 on the old pre-reorganized claim against the debtor company.

What the architect of this extraordinary complaint has undertaken to do is to try to put two things together. But neither, as I said before, can be accomplished and neither supports the other. It is an attempted retrial of the tax savings suit beyond any question. They so state in their return, and beyond question they attempt to find something in Judge Byrne's opinion in the tax savings case which, as they view it, will enable them to revise that ancient claim and now get some money. I submit to your Honor that is simply impossible.

I don't know what counsel expects to gain by quoting from the letter addressed by the receiver to the Western [54] Pacific Railroad Corporation in advance of bringing this litigation, on page 14. I don't know as I need to comment upon it. I think merely an announcement to the effect that if the Supreme Court should refuse to give the corporation the relief it sought by the second petition of certiorari then there is intention to bring some kind of an action out here in the bankruptcy court, that to my mind is meaningless. It is just an announcement that this vexatious litigation will continue, and nothing more.

I think I have probably said enough respecting both what took place in the reorganization proceed-

ing and what took place in what we call the tax savings suit before your Honor.

There can be no question at all that the order, the judgment, the decrees in those three litigations, in those two pieces of litigation, are final and conclusive. Now here we are after the reorganization proceeding, already a period of ten years. We got through it. And the litigation which was started before your Honor required seven years before we were through with that. There must come a time when litigation should come to an end. And this litigation should now come to an end without a resumption of this harassing litigation.

There is something I went to say in response to counsel's plea that the institution of this suit should not be deemed contemptuous. Plainly it is contemptuous and our memorandum of authorities I think makes that very clear to your Honor. [55] We have reproduced in that memorandum of authorities a copy of the order made by Judge St. Sure in another contempt proceeding, the same counsel being opposed. If your Honor will have that in mind. That is a memorandum of authorities in the contempt matter. It is on page 2 of the memorandum, which I think is at the bottom of my file. I take it your Honor has it.

This is Judge St. Sure's order, and I am referring to paragraph (f) on page 2, which I now read:

"The Court, being fully advised, finds \* \* \* that in and by said action The Western Pacific Railroad Corporation has asserted and now asserts a claim against the petitioner which, if it exists at all, ex-

isted on and before December 28, 1944, and was released and discharged by said Final Order; that the assertion of such a claim was and is barred and enjoined by said Final Order; and that the commencement of said action is not and has not been provided for or permitted by any order of this court.”

In that case, as here, The Western Pacific Railroad Corporation was attempting to sue the reorganized Western Pacific Railroad Company upon a claim which, in the language of Judge St. Sure and in the language of his order, existed on or before December 28, 1944. Therefore, the suit was contemptuous, and the court so held. [56]

I argue the respondent should be adjudged guilty of contempt, and knowingly so guilty. Having said that, I believe it to be my duty to afford justification.

In the first place, New York counsel for The Western Pacific Railroad Corporation participated throughout the reorganization proceeding. He is familiar with all that took place there and obviously cognizant of all of the orders—obviously and properly brought to his attention. He was therefore fully advised respecting the orders of the reorganization court and fully advised in particular respecting the orders which cancelled the claim of the corporation ordering it discharged and forbade the institution of suit upon that as well as prior claims of similar character. That is the first thing.

Now, secondly, we come back again to the Sacramento Northern Railway proceeding in which Judge

St. Sure held that the suit then brought by the corporation was contemptuous. Your Honor will recall that some time later the corporation filed its petition in the bankruptcy proceeding for what was called a modification or clarification of that general order with a view to permitting the corporation to reinstitute that suit, a new suit upon the same ground. It came before your Honor as successor to Judge St. Sure in the bankruptcy proceeding. The petition that was filed has not a little significance, and I am talking now about the petition that [57] was filed on the part of the corporation and dated August 18, 1947, in behalf of the railroad corporation by LeRoy R. Goodrich and Frank C. Nicodemus, Jr., of counsel. I am quoting from paragraph 9, and the purpose is to make clear to the Court what counsel then knew and understood as to what these injunctive proceedings meant. I am now quoting:

“The petitioner further represents that the true intent and purpose of the final order of March 28, 1946, was to prevent the reassertion of claims against the debtor railroad corporation which existed at the date the debtor’s properties were placed into judicial custody, August 2, 1935, and which were cut off or intended to be cut off by the plan or reorganization as of its effective date, January 1, 1939.”

Now here I interrupt the quotation for a moment because I wish to emphasize what is there said by opposing counsel, same counsel opposing us here, that the intent of that final order was to cut off

claims which existed on August 2, 1935, to prevent the reassertion of those claims, as I already read.

Now the sentence continues, and I continue with it for just the sake of completing it, although it is not pertinent to the instant matter:

“And it was not intended to cut off valid and subsisting claims against the trustees created [58] by or resulting from business transacted by and with the trustees during the period of judicial operation and administration.”

In short, this Court did not by its order of March 28, 1946, intend to repudiate any of its own obligations or what was tantamount there to the obligation to the trustees.

As counsel recognize and declare, the purpose of the opinion of the injunctive provision was to forbid the reassertion of claims which existed before August 2, 1935, which were intended to be cut off by the order but was contending that the particular case he had represented a claim against the reorganization trustees. The Court thought otherwise. But that is the claim, that is the distinction.

As I was saying, if counsel for the corporation understood on August 18, 1947, when they filed their petition with your Honor that such was the purpose and the effect of those injunctive provisions, they must have had the same understanding as to their meaning when they filed this new bill of complaint in April of this year.

Court orders are to be obeyed. When a court order has knowingly been disobeyed, judgment of contempt and appropriate disciplinary measures

should follow as a course, and I think it is necessary to the vindication and enforcement of the court's jurisdiction, and otherwise there is never an end of litigation, notwithstanding an injunction forbids that [59] litigation.

I think, if your Honor please, I need not take up separately now our motion for a summary judgment. In effect, I think everything that is germane to that has already been developed in the course of argument. That motion is rested upon conventional rules of court in the first instance. There is no genuine issue of fact, and there is none. I have filed our motion for summary judgment, and we rest that motion for summary judgment fundamentally upon two very simple matters. First, the final judgment and the decrees in the reorganization proceeding, which not only had annulled this particular claim of the corporation to its antecedent advancements to the old debtor company, that suit upon it, but brought the whole proceeding to an end. That has been dead, as I say, for all these years.

And, second, we rely upon your Honor's judgment in the tax saving case which was confirmed by the Court of Appeals, not disturbed by the Supreme Court, as a final judgment which is *res judicata* of all issues raised in that proceeding or which could have been raised in connection with that litigation.

Those two cases, the results of those two cases, afford a complete bar to the action here being attempted in this proceeding.

Now I will say just one thing more, if your Honor please. I think I have already suggested it, and I

would like to suggest [60] it once more. There must come a time when we can be through with litigation, and that time we feel has been reached here. The reorganization proceeding was more than ten years, and a good many, many years have passed since that was closed, the final order in 1946—eight years, the litigation before your Honor took more than seven years. There can be no question that the judgments, orders, whatever took place in those two proceedings, are final and that they are *res judicata* in all aspects, and we think this further hearing is merely intolerable.

If there are any inquiries from your Honor, I will be glad to answer them. But I think that I need not cover the ground that I have marked off for possible discussion. It seems to me the issues are now quite clear.

Mr. Goodrich: Your Honor, first I will refer to counsel's statement with regard to the expression used by Judge Byrne in his decision and the argument which he says I made upon it. I certainly would not insert or omit a word in quoting from any decision of any judge before this or any other court. I think what I did in reference to the decision of Judge Byrne was to read precisely as Mr. Matthew has read certain sentences from that decision and the sentence in which—the two sentences in which the word "creditors" appears. They are these; speaking of the fact that the corporation was the sole owner of the subsidiary capital stock, the Judge says:

"As such it was under a duty to deal fairly [61]



with the subsidiary having full regard for the interests of the creditors and holders of other securities \* \* \* It owed a duty not to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty."

And in the next paragraph he again uses the same word, "creditors"—in this fashion—he says:

"If Corporation had required tribute as a condition of its co-operation, then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

Now, that is exactly the same as I read both of those sentences before. It is true, I think, that in the course of the discussion of the possible effect of that decision I spoke of these three creditors as the "unpaid creditors." But surely the distinction between the one and the other is perfectly obvious and I think Mr. Matthew is wrong in implying that I in any fashion distorted the language of the Judge. The Judge was speaking of the fact that we were required to make this tax credit available to the railroad company, as he puts it—to make sure that we will have it now—because we had to deal fairly with the company "having full regard for the interests of the creditors and holders of other securities," and he said that if we had not done so we would not have been acting with "the required standard of fairness to the subsidiary's [62] creditors."

Well, of course, the only creditors who had not been fully paid were these creditors, and that is why in discussing Judge Byrne's statement I referred

to them as the "unpaid creditors." It is perfectly correct, the Judge did not use the word "unpaid." I used the word "unpaid." Because it is the only way in which we could possibly determine what the Judge's statement meant.

If a creditor has been paid in the course of a bankruptcy proceeding, it seems to me he ceases to be a creditor at all, for the simple reason that payment wipes out the debt in full. If in a bankruptcy proceeding the creditor is not paid for the reason that there are not assets enough to make it possible to pay him at all, then his claim, while it may be valueless in the sense that there are no present assets to pay it, his claim is still a claim, the debt is still a debt. Even a discharge in bankruptcy does not discharge the debt, and, as I have cited to your Honor, and although I need not supply the authorities—every attorney knows—that subsequent to the discharge in bankruptcy a new promise will make that debt good again and serve the purpose of reviving it; or I can offer to give "A" some money, provided he will pay it to "B" who was his creditor; even though the debt has been wiped out in bankruptcy and I provide the money, I think then "A" is under obligation to pay it to "B."

The Court: At least good to the extent that the creditor [63] can't sue you for it any more.

Mr. Goodrich: That's right. It just means that the creditor as a creditor can't sue.

All right. Now——

The Court: Well, don't you think it is just as reasonable an interpretation of Judge Byrne's state-

ment that the corporation owed this duty whether they are creditors or not?

Mr. Goodrich: That what?

The Court: Isn't it a reasonable interpretation of what Judge Byrne was saying that the holding company would have had this obligation to do this whether they were creditors or not? They might have had the obligation on the ground that the holding company could make more money, the operating company could make more money. It isn't necessarily an obligation that solely arose for the benefit of the creditors.

Mr. Goodrich: We don't find any such statement in the decision.

The Court: The reason Judge Byrne puts it that way is because this happened during the reorganization, that's all. That is a——

Mr. Goodrich: In any event, your Honor, let me make it perfectly clear that what we have attempted to do here is simply seek here from this court an interpretation which the receiver has felt that he was entitled to have of the effect of this decision of Judge Byrne's. [64]

The Court: Don't you think that was a little presumptuous of this receiver in Delaware to ask the District Court, by filing another suit, to interpret the opinion of the Circuit Court of Appeals?

Mr. Goodrich: Well, I don't know. If the decision means what it appears to mean, then it would appear that Judge Byrne felt that this money, when paid over would be paid over because there were creditors whose claims had not been satisfied.

The Court: I never have heard in my experience of the District Court being asked to interpret what the Circuit Court said when it decided a case as to the meaning of some of its language in a case. It is true that we cite sometimes decisions for what comfort we get out of some language in them—sometimes they are applicable, sometimes they are only dictum. I don't quite see the basis of the thinking of the receiver in Delaware who asks this court to—who files this suit to recover some money and calls that a proceeding to ask the court to interpret the language of the Circuit Court.

Mr. Goodrich: At least it seemed clear, I think, to the receiver, that the effect of Judge Byrne's decision was, as we have set it forth here, that his intention was to say that our obligation was created by the fact that there were creditors who were entitled to have this fund made available to the railroad company. Now if the receiver's view, the [65] view of the corporation with regard to that decision is correct, if that is what Judge Byrne's statement meant, and that's the import and force of it, then obviously there would be upon the receipt of the money from those tax credits a trust relationship established on the part of the railroad company to so do. Otherwise, it would seem that the words that are used mean nothing. If you say, as it says here, that if we had not done so we would not have been acting fairly to the subsidiary's creditors, and that we couldn't bargain, couldn't even make any arrangement with them of any fashion with regard to this fund. We had to deal fairly, it says, with

the subsidiary, having full regard for the interests of creditors and holders, and that seems to mean that they simply have to turn the entire fund over to the railroad company because there were creditors.

Well, the only creditors that we may have, of course, would be the unpaid creditors, and from that it would seem to flow that these creditors now had a right to ask the court to, under the force of this decision, to regard this as a trust fund from which they would be reimbursed.

That is not an action on the original claim. I agree with Mr. Matthew that the original claim as a claim in bankruptcy is dead. A claim presented to the bankruptcy court after a discharge in bankruptcy, the claim is dead. But——

The Court: Well, if it is dead, what difference does it make if there was a trust fund? [66]

Mr. Goodrich: The obligation still persists according to the authorities. All that is wiped out is the right of the debtor to sue on that claim and that is——

The Court: Well, all right. How can you sue on the claim if the claim is dead?

Mr. Goodrich: We can't sue on the claim.

The Court: Isn't that what you are doing? You are suing the railroad, you are suing the defendant here on the claim.

Mr. Goodrich: We sue on the claim as a matter of law, if it were a good claim and we could sue on it. We can't do that——

The Court: Suppose I have got a claim against

But I think there are some filed here—aren't there, already?

Mr. Nicodemus: No, I think we have filed—I would like to file a brief memorandum.

The Court: What parts are there that you wish to raise in addition to what has been argued here today?

Mr. Matthew: If your Honor please, I submit that counsel has had ample time to file his memorandum here. He should have done it before.

The Court: I don't think there should be any particular delay in this matter, unless there is some purpose to be served by it or some point that is to be urged that has not been covered. [69]

I will say very frankly in my opinion there doesn't appear to be the slightest merit to this proceeding at all and that it ought to be dealt with as a contempt of the restraining order that was issued and that appropriate expenses should be allowed. I just don't think that there is the slightest merit to it. I have listened patiently to the arguments. There hasn't been anything said that gives any basis for this suit.

Now, if there are some additional legal points that have not been presented, why, it is kind of late for me to hear them now. I don't want to be arbitrary about the matter, but we have got a lot of matters in this court that have to be given attention. I have listened for an hour this morning to this matter—two hours, rather. I have read the pleadings in the case, and I don't want to be curt or cruel about the matter, but there just doesn't appear to me to be

the slightest merit in the suit. There is just nothing in it at all. To bring an action in this court on the basis of some few words that a judge said in another proceeding as some of his reasons for deciding the case the way he did decide it, as the basis for taking up the time of the court with new litigation over the very same matter, just does not seem to me to have any—to require too much attention on the part of the Court.

Sometimes we overlook some things, but if this were some simple piece of litigation in which the same thing were done and all of the eminent counsel had been involved were not [70] involved, and it was a suit over somebody slipping on a doorstep, the court wouldn't give very much time or consideration to as specious a claim as this is.

There hasn't been anything said to me here this morning—I don't want to be too, as I say, emphatic about it; there isn't anything that has been said that gives the slightest basis to the suit whatsoever. There is just nothing in it at all. And I suspect—although I shouldn't say this—there may be some hope that somebody might be willing to pay something for avoiding a long-drawn-out litigation.

I think this motion for summary judgment of the defendant should be granted. I think an order of contempt should be made, and I think you ought to be required to pay the expenses and counsel fees that have been required of defendant to defend the matter.

I don't think you can just go on pursuing litiga-

tion under circumstances of this kind without it being and affront to the judicial processes.

Now, counsel, if there is some legal point that has been overlooked upon which you want to file a memorandum and you want to point that out, why, I shall allow further time, if you wish, to have a rehearing in the matter, but just to have a rehash of what has been said here today, I don't see any reason for it.

I say, if there is some additional legal point that has [71] been overlooked.

Mr. Nicodemus: I would like to file a memorandum on the effect of the decree which is the basis of the order to show cause. I don't think we were within the scope of the injunctive provision of that decree. I would like to elaborate that, and that is quite fundamental. I can do it within the week, if you will give me that much time.

Mr. Matthew: If your Honor please, counsel has had ample opportunity to file that memorandum before this. When we submitted our petition and the motion was served upon him, with our memorandum of points and authorities, it was very specific, he had a chance at that time in making his return to file his memorandum of points and authorities. He didn't do it at all. There is nothing here at all—

The Court: All I am trying to find out, Mr. Matthew, is if there is some point in addition to what has been argued here. Now, what do you mean when you say you want to file a memorandum as to the effect of the decree? If you will tell me something that constitutes some cause or reason for it—I



don't like to deny any counsel the opportunity to file that memorandum—I just don't know what the reference is to.

Mr. Goodrich: If your Honor please, Mr. Nicodemus has said he is having trouble talking and he says that what he has in mind is to file a memorandum with regard to the force of the decree and the fact that this is not within the scope of [72] the prohibitive matters in the decree.

I think—if I understand you correctly (to counsel).

The Court: Do you know what his point is?

Mr. Goodrich: No, I do not, your Honor. I have not had any opportunity to discuss it with him.

And, as far as the memorandum is concerned, I think Mr. Matthew will realize, while I represent the Western Pacific Railroad Corporation here, Mr. Nicodemus and Mr. Marvel, the attorneys for the receiver, are in the east, and following the receipt of the petition for an order to show cause why we shouldn't be held in contempt—rather, the corporation—I communicated that properly to them, but we had only a limited number of days within which to prepare any memorandum at all.

The Court: Mr. Goodrich, I prefer to look a little bit more—in this I don't mean any criticism—I prefer to look a little bit more to you with respect to this matter. I intend to make an order along the lines I have stated here today. I will hold it up for five days, and if you have anything further, after consideration of the matter, that you wish to—that you feel is any different and that you wish to sub-

mit to the Court, do it within that time, and you can confer with counsel in that regard.

Mr. Goodrich: I will be glad to do that, and I will either file it or advise your Honor that it will not be filed.

The Court: I will formally mark the matter submitted, [73] but counsel are aware of what the Court's intentions are in regard to making an order, but I will hold it up for—if you wish—time isn't so important—let's say ten days.

Mr. Goodrich: That will give Mr. Nicodemus a chance to return east and prepare his memorandum.

(Matter submitted.)

[Endorsed]: Filed September 7, 1954. [73-A]

**No. 14,505**  
IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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A. B. PHILLIPS, Executive Director,  
Employment Security Commission  
of Alaska,

*Appellant,*

vs.

FIDALGO ISLAND PACKING Co.,

*Appellee,*

CLARA WILSON,

*Intervenor.*

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**BRIEF FOR APPELLANT.**

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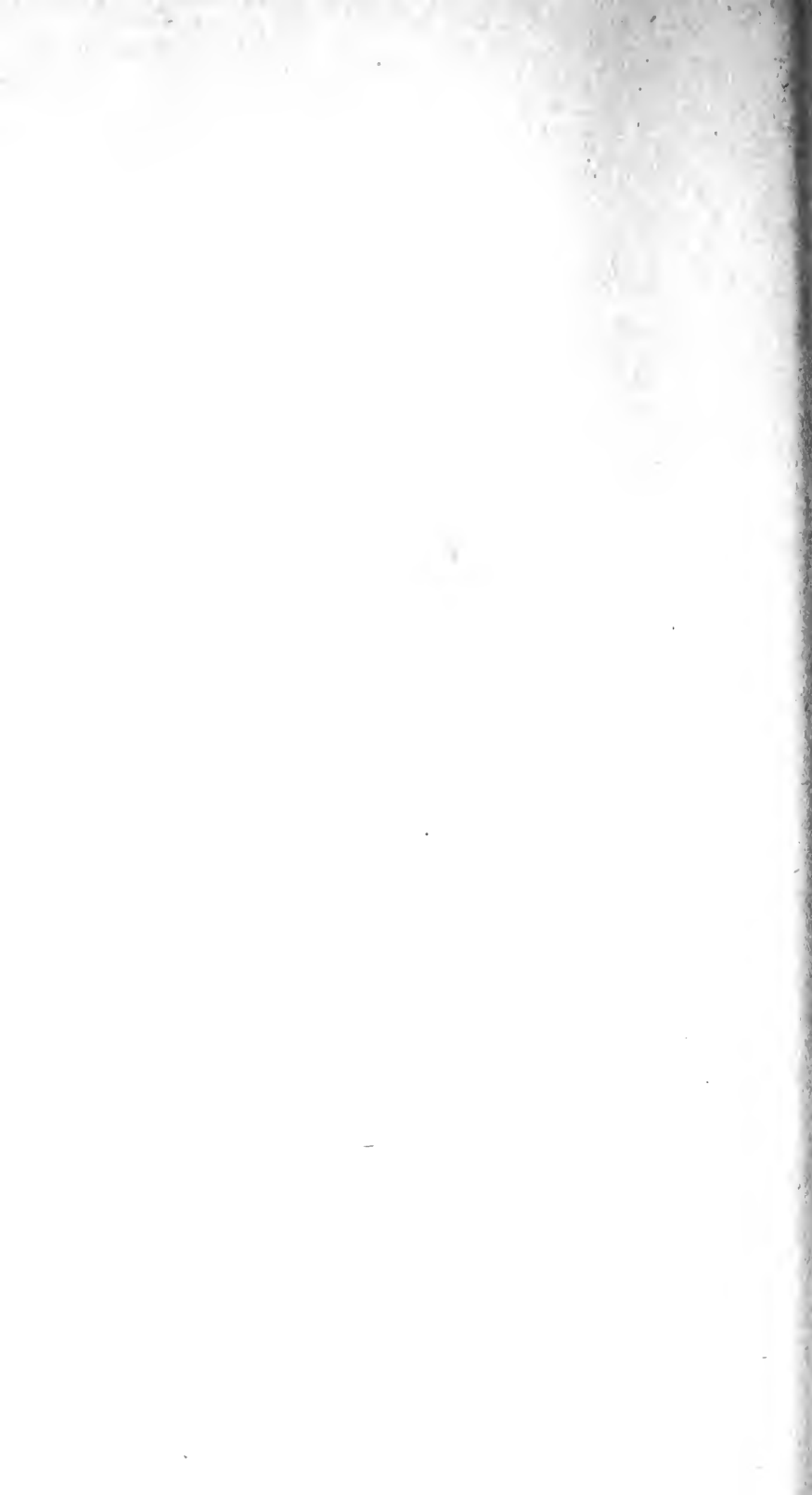
Juneau, Alaska.

*Attorneys for Appellant.*

**FILED**

**FEB 16 1955**

**PAUL P. O'BRIEN,  
CLE**



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No. 14,505

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*Appellee,*

CLARA WILSON,

*Intervenor.*

---

**BRIEF FOR APPELLANT.**

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**OPINION BELOW.**

The opinion of the District Court is reported in  
120 F. Supp. 777.

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**JURISDICTION.**

On July 30, 1953, the appellee filed suit to enjoin the enforcement of Benefit Regulation No. 10, which regulation prescribes the seasonal periods for certain cannery employers who were previously determined

to be seasonal under the Alaska Employment Security Law. On April 27, 1954, the new executive director, A. B. Phillips, was substituted as defendant. (R. 45.) On May 12, 1954, the Court caused to be filed its findings of fact and conclusions of law, whereby, among other things, it found that (R. 55):

(1) Sec. 7(c)(1) of Ch. 99 SLA 1953 requires the Commission to determine as seasonal every employer in Alaska whose payroll experience meets the said section's definition of a seasonal employer;

(2) that the Commission's classification of the plaintiff as a seasonal employer while failing to also classify all other employers in Alaska whose payroll experience met the 7(c)(1) formula constituted unjust discrimination and will cause the appellees irreparable damage, thereby entitling them to a permanent injunction against the enforcement of Regulation No. 10. (R. 201.)

On May 12, 1954, judgment was entered declaring the regulation void and a permanent injunction issued enjoining the appellant from enforcing the same. (R. 65.) An appeal was taken on June 11, 1954, by filing a notice of appeal. (R. 67.) The jurisdiction of the District Court rests on the Act of June 6, 1900, 31 Stat. 322, as amended, 58 USC, Section 101; the jurisdiction of this Court on Section 1291 of the New Federal Judicial Code.

### QUESTIONS PRESENTED.

(1) Should an injunction have been issued against the enforcement of Regulation No. 10?

(2) Is the doctrine of exhaustion of administrative remedies applicable?

(3) Did the Court commit reversible error in judicially noting that the Alaskan construction industry, save Ketchikan and vicinity, is seasonal in fact?

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### STATUTES INVOLVED.

(See Appendix *infra*.)

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### STATEMENT.

This action was instituted by appellee, Fidalgo Island Packing Co. on July 30, 1953, to enjoin the enforcement of Benefit Regulation No. 10 and to have the same declared to be null and void for these reasons (R. 12):

(1) the appellant had no power or authority to issue or enforce it;

(2) its enforcement would work irreparable damage to appellee and all others engaged in the canning of salmon in the Territory of Alaska.

Appellee, Clara Wilson, by Court order dated November 28, 1953, was permitted to intervene over the appellant's opposition. Her complaint in intervention prayed for the same relief as sought by appellee, Fidalgo Island Packing Co. (R. 15.)

Appellee, Fidalgo Island Packing Co., is a foreign corporation entitled to do business in Alaska. It cans and packs, for outside distribution and consumption, salmon caught in Alaska.

On June 29, 1953, the said appellee, pursuant to Sec. 7(c)(2) of Ch. 99 SLA 1953, was formally notified in writing that the Commission had determined it to be a seasonal employer. On the face of said notice was the notation that any employer determined to be seasonal has the right, within fifteen days after it received notice thereof, to appeal to the Commission from said determination. (R. 32.) Appellee, though it had actual notice thereof, did not appeal.

On June 29, 1953, Benefit Regulation No. 10 was promulgated, which specified, for only previously determined seasonal employers, the seasonal periods during which unemployment benefits shall be payable to their employees, if unemployed during said seasonal period. (R. 8, 9.)

The District Court granted a preliminary injunction on August 17, 1953, enjoining the enforcement of said regulation. On November 27, 1953, the Court heard extensive arguments in support of defendant's motion for summary judgment. (R. 76-85.) However, the Court never decided the motion. Thereafter, trial on the merits was had on April 27, 28, 29 and May 3, 1954, at which time the parties submitted evidence and offers of proof in support of their respective positions. On May 7, 1954, the Court issued its opinion, holding (R. 42):

(1) Benefit Regulation No. 10 was issued without authority and therefore is void;

(2) That Section 7 of Ch. 99 SLA 1953 required the Commission to seasonally classify every employer in Alaska whose payroll experience met the Sec. 7(c)(1) statutory definition, and the government's seasonal classification of the appellee while failing, at the same time, to classify all other allegedly seasonal employers, constituted unlawful discrimination;

(3) that said failure to classify has caused a serious drain on the fund, which may irreparably damage appellee and intervenor (R. 52), thus entitling them to a permanent injunction.

Finding of fact and conclusions of law were filed in accordance with the Court's opinion (R. 55), and on May 12, 1954, judgment and decree was entered and a permanent injunction issued enjoining the enforcement of Benefit Regulation No. 10. (R. 65-67.)

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#### **SPECIFICATIONS OF ERROR. (R. 69.)**

##### **I.**

The Court erred in holding that the doctrine of exhaustion of administrative remedies should not be applied. This is error since the statute expressly requires an appeal to the Commission after a determination of seasonality and appellee neglected to so appeal.

## II.

The Court erred in holding that the authority to determine seasonality was neither delegated nor intended to be delegated. This is error since the statute expressly permits the Commission to delegate its regulation-making authority. Such a delegation was in fact made and Regulation No. 10 promulgated pursuant thereto.

## III.

The Court erred in holding that the regulation is inconsistent with the law and that under no circumstances could it ultimately be upheld. This is error since Regulation No. 10 complies with the law in that it specifies the seasonal periods during which benefits shall be payable to certain cannery employees whose employers were previously determined to be seasonal. It was not intended, nor does it attempt, to seasonally classify any employer or industry.

## IV.

The Court erred in holding that the statute strips the Commission of all discretion in seasonality classification and constitutes a mandate of law that all employers and employing units be classified as seasonal and nonseasonal. This is error since such an interpretation is contrary to the letter and spirit of the statute, imposes an insurmountable burden on the Commission, makes it administratively impossible to carry out the law and is contrary to long established administrative practice.



## V.

The Court erred in finding that the Commission's failure to classify the construction industry is the largest factor contributing to the fund's depletion. This is error since there is not one scintilla of proof establishing a causal connection thereby.

## VI.

The Court erred in taking judicial notice that the entire construction industry in Alaska, except Ketchikan and vicinity, is seasonal in fact. This is error because the Court invaded an area reserved exclusively to the Commission and arbitrarily found as a fact a matter open to serious dispute.

## VII.

The Court erred in rejecting the appellant's offer of proof relative to seasonality in the construction industry. This is error since, if accepted, it would have shown that previous Commissions determined that there exist adequate grounds for not classifying the construction industry as seasonal.

## VIII.

The Court erred in holding that appellee and intervenor would be irreparably damaged and discriminated against by the enforcement of Regulation No. 10. This is error since appellee, qua appellee, cannot be damaged by the enforcement of the regulation. Appellee can be the champion only of its own rights and therefore is precluded from asserting the

rights, if any, of its employees. The only conceivable discrimination, if any, is against appellee's employees, not against appellee. The intervenor, since not a seasonal employee, can in no way be injured by the enforcement of the regulation.

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### **FINAL ISSUES.**

The specifications of error (R. 69) may be grouped, for purposes of simplifying argument, into three questions, which therefore become the main issues in this case.

#### *Issue I.*

Should an injunction have been issued under the facts of this case? (Errors No. 5 and 8.)

#### *Issue II.*

Does the doctrine of exhaustion of administrative remedies foreclose appellee's right to judicial relief? (Errors No. 1, 2, 3, 4 and 7.)

#### *Issue III.*

Did the Court commit reversible error in taking judicial notice that the Alaskan construction industry, save Ketchikan and vicinity, is seasonal in fact? (Error No. 6.)

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### **SUMMARY OUTLINE OF ARGUMENT AND AUTHORITIES.**

#### *Issue I.*

An injunction should not have been issued against the enforcement of Regulation No. 10.

## Point 1.

Appellee has not been threatened with irreparable damages because of the promulgation or enforcement of Regulation No. 10.

*Eccles v. Peoples Bank*, 333 US 426, 431.

## Point 2.

The appellee specifically requested that the seasonal periods during which benefits shall be payable be coordinated with the open seasons set by the Fish and Wildlife Service Regulations.

## Point 3.

The only possible injury, if any, would be to appellee's seasonal employees and not to the appellee as an employer.

*Sheldon v. Griffin*, 174 F. 2d 382, 384;

*Hess v. Mullaney*, 213 F. 2d 635, 640;

*Jeffrey Mfg. Co. v. Blagg*, 235 US 571, 576.

## Point 4.

Possible higher contributions by employers in lieu of credit ratings not an element of irreparable damages.

Section 51-5-5(c) ACLA 1949.

## Point 5.

Resident salmon industry employees are put in a favored class, not discriminated against, by the enforcement of Regulation No. 10.

## Point 6.

Intervenor Wilson as a non-seasonal employee was not injured.

Chapter 99 SLA 1953;

Sec. 5, Ch. 99 SLA 1953.

*Issue II.*

The exhaustion of administrative remedies doctrine applies herein.

## Point 1.

Chapter 99 requires that administrative appeal be taken within 15 days after a determination of seasonality. Appellee's failure to so appeal should preclude injunctive relief.

Sec. 7(c)(2) of Ch. 99 SLA 1953;

Sec. 51-5-7(h) ACLA 1949;

*Myers v. Bethlehem Shipbuilding Corp.*, 303 US 41;

*Abelleira v. District Court of Appeal*, 109 P. 2d 942, 949;

*Oklahoma Welfare Comm. v. State*, 105 P. 2d 547;

*Lichten v. Eastern Airlines*, 189 F. 2d 939, 25 ALR 2d 1337 (1951);

*United Fuel Gas Co. v. Railroad Comm.*, 278 US 300, 309-310;

*Miles Laboratories v. Fed. Trade Comm.*, 140 F. 2d 683, 685;

*La Verne Co-op. Citrus Ass'n v. U. S.*, 143 F. 2d 415, 419 (9th CCA);

*Chicago v. O'Connell*, 8 ALR 916, 919;  
*Smith v. Duldner*, 175 F. 2d 629, 631.

The following is an analysis of the four reasons the trial Court gave in support of its holding that the exhaustion doctrine should not be applied, i.e.:

(1) That the determination of seasonality was neither delegated nor intended to be delegated;

(2) that the regulation is invalid because:

(a) the statute requires the Commission to pass upon the seasonal status of all employers, and if anyone meets the statutory definition he must be classified. (R. 50.) Regulation 10 did not so classify all employers;

(b) the regulation classifies employers on an industry-wide in lieu of an individual basis. (R. 50);

(c) the regulation was adopted without notice and without an opportunity to be heard (R. 51);

(3) that the possibility of a deadlocked Commission is relevant in this case (R. 51);

(4) the remedy sought is judicial rather than administrative (R. 51).

*Reason No. 1:* Was the executive director vested with delegative authority to make a determination and issue a seasonal regulation?

Sec. 51-5-1(f) ACLA 1949;

Sec. 7(c)(2) Ch. 99 SLA 1953;

Ch. 82 SLA 1953;

Ch. 83 SLA 1953;

P. 847-850, 1953 Sen. Journal, 58th day (message from Governor of Alaska vetoing House Bills 128 and 129, regarding Alaska Employment Security Commission);

P. 851, 1953 Sen. Journal, 58th day (message from House stating it had passed both bills);

P. 923, 1953 Sen. Journal, 60th day (Bill No. 128 passed by Senate);

P. 923, 924, 1953 Sen. Journal, 60th day (Bill No. 129 passed by Senate);

50 *Am. Jur.*, Statutes, p. 538, Sec. 533;

*Bear Lake & R. W. & I. Co. v. Garland*, 164 US 1, 11, 12;

*Pacific Mail S. S. Co. v. Joliffe*, 69 US 2 Wall. 459 (7.808);

*Posadas v. National City Bank*, 296 US 497, 505;

*State Tax Comm. v. Katsis*, 90 Utah 406, 62 P. 2d 120, 107 ALR 1477, 1480.

*Reason No. 2:* Is the regulation invalid?

(a) Does the statute require the Commission to pass upon the seasonal status and require that seasonal periods be set for all employers?

Sec. 7(c)(1) Ch. 99 SLA 1953;

Sec. 51-5-2(c) ACLA 1949;

Ch. 4 SLA 1937 (Extraordinary Session), Section 3(c)(1) thereof;

Ch. 1 SLA 1939, Section 12 thereof;  
 42 *Am. Jur.*, Pub. Adm. Law, Sec. 77, 78.

(b) Does the regulation classify the salmon industry employees on an industry-wide in lieu of an individual employer basis?

Sec. 7(c)(2) Ch. 99 SLA 1953.

(c) Was Regulation No. 10 adopted without notice and without affording the appellee an opportunity to be heard?

Sec. 51-5-11(b) ACLA 1949.

*Reason No. 3:* Is the possibility of a deadlocked Commission relevant on the question of the exhaustion doctrine's application?

*Oklahoma Pub. Welfare Comm. v. State*, 105 P. 2d 547, 551;

*Abelleira v. District Court of Appeal*, 109 P. 2d 942, 953;

P. 921, 922, Sen. Journal, 21st Sess., 60th day, Alaska Leg.

*Reason No. 4:* Is the matter of the remedy sought herein judicial rather than administrative?

39 Cornell Law Quarterly, 273, 283, 285, 286;

*Gonzales v. Williams*, 192 US 1;

*U. S. v. O'Donovan*, 178 F. 2d 876;

*Briener v. Wallin*, 79 F. Supp. 506, 507, 508;

*Ex Parte Fabiani*, 105 F. Supp. 139 (E. D. Pa., 1952);

*United Fuel Gas Co. and Wallin* cases, *supra*;

Sec. 7(c)(2) Ch. 99 SLA 1953;

Sec. 7 Ch. 99 SLA 1953;

42 *Am. Jur.*, Pub. Adm. Law, Sec. 201;  
*Oklahoma Pub. Welfare Comm. v. State*, 187  
 Okla. 654, 105 P. 2d 547.

### *Issue III.*

The trial Court committed prejudicial error in judicially noting that the Alaskan construction industry is seasonal, save Ketchikan and vicinity.

#### Point 1.

The prerequisites for judicial notice were not fulfilled.

20 *Am. Jur.*, Evidence, Sec. 17.

#### Point 2.

Appellant's offer of proof, if accepted, would have shown that all of the construction industry is not in fact seasonal and that there are good and sufficient reasons why a sizeable portion of said industry should not be seasonally classified.

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## **ARGUMENT AND AUTHORITIES.**

### **ISSUE I.**

**AN INJUNCTION SHOULD NOT HAVE BEEN ISSUED AGAINST  
 THE ENFORCEMENT OF REGULATION NO. 10.**

#### Point 1.

Appellee has not been threatened with irreparable damages because of promulgation or enforcement of Regulation No. 10.

The appellee's contention as to how it is being threatened with irreparable damage is set forth on



pages 3 and 4 of its April 27, 1954, brief filed in the District Court:

“We state these facts to show that the fund is in serious danger of depletion. In fact, the record shows that the fund now has, at the end of March 1954, less than 50% of the amount it had at the end of December 1948 (App. vi), and where employers are paying into a fund for unemployment insurance for its employees and the fund is being so rapidly depleted, the contributors are bound to suffer irreparable injury and the employees are bound to suffer irreparable injury under the law, for Section 51-5-2 ACLA 1949 provides that when the amount of the reserve goes down to \$2,000,000, the benefits to unemployed are automatically decreased by almost 50%. This alone illustrates the irreparable injury to both employer, Fidalgo Island Packing Company, and to the intervenor, Clara Wilson, who is an employee. This argument applies to all employers and contributors to the fund in the territory.”

The District Court apparently was persuaded by the appellee's fund-depletion argument as stated above. The following is the Court's statement as to why it held that the appellee was irreparably damaged:

“The claim of irreparable injury is based, in the main, on the progressive diminution of the fund, which in turn will require greater contributions by, and the loss of credit ratings to, the employer, and decreased benefits to the employee.

“The failure to classify the construction industry as seasonal is undoubtedly the largest contributing factor in the process of depletion . . .

“As between resident and nonresident workers in the canned salmon industry, the resident may receive benefits only if unemployed during the period referred to, whereas the nonresident is not so limited.”

It is apparent, therefore, that the Court issued an injunction primarily on the ground that the fund's balance is diminishing.

To grant an injunction against a regulation which was designed to protect the fund by restricting payments therefrom, while stating at the same time that the reason for the injunction is to protect the fund, is indeed an anomalous twist of logic. If the trial Court's decision nullifying the regulation is not set aside, there will be a further one-half million dollar drain on the fund. If the decision is reversed, \$650,000.00 will be credited to the fund's balance. (R. 73 and 75.)

It is difficult to understand how the trial Court, which is gravely concerned about the rapid depletion of the fund, could issue an injunction, the direct cause of which would further deplete the fund.

Appellee, in answering defendant's requests for admissions, admitted that if Regulation 10 is nullified the fund would become further depleted:

“. . . and probably if it is not enforced and no other regulation is adopted . . . benefits may be payable over a 52-week year, thereby quickly depleting the fund.” (R. 36.)

There is no connection between the promulgation of the regulation and the alleged depletion of the

fund. The District Court has voided the regulation not because its enforcement depletes the fund, but because of the Commission's "failure to classify the construction industry . . ." (R. 52.) It appears that the appellee has pursued an improper remedy, if indeed it is entitled to any. The nullification of Regulation No. 10 will in no manner preserve the fund. Quite the contrary, it manifestly subjects it to further exhaustion. (R. 35, 36.)

Appellee brought suit to enjoin Regulation No. 10 on July 30, 1953. The short period of time between the effective date of Section 7 of the Act April 1, 1953, and July 30, 1953, is not sufficient time to give the Commission the opportunity to investigate the seasonality status of every employer in Alaska so as to obviate the charge of discrimination against the canned salmon industry. (R. 242-244.) Neither the appellee nor the District Court has given the new Commission, which first met in August of 1953, the opportunity to pass upon the seasonality problem. Instead, the appellee filed a premature law suit and further aggravated the seasonality problem.

Upon the highly speculative ground that the fund may be depleted (not because of the enforcement of Regulation No. 10) and because the construction industry was not classified on or before July 30, 1953, the District Court granted injunctive relief to a private corporation as against a public regulation designed to protect the trust fund.

The Supreme Court has ruled that an injunction should not issue against a public agency as against a

private person unless the need for same is clear and not remote or speculative. *Eccles v. Peoples Bank*, 333 US 426, 431.

### Point 2.

Appellee specifically requested that the seasonal periods during which benefits shall be payable be coordinated with the open seasons set by Fish and Wildlife Service Regulations.

Mr. Gilmore, representing Alaska Salmon Industry, Inc., an association of non-resident salmon packers of which appellee is a member, conferred with Mr. McLaughlin, former executive director and initial defendant herein, prior to the issuance of Regulation No. 10. Mr. Gilmore specifically requested that the benefit periods in the regulation be coordinated with the open fishing seasons set by Fish and Wildlife Service regulations. (R. 217, 218.) This request was honored. Since then, however, appellee has reversed its position and now contends that the setting of the benefit seasons in Regulation No. 10 in accordance with Fish and Wildlife Service open seasons is:

“... not according to the actual experience of the employer during the previous year, but they are set on an area basis, using the salmon fishing seasons of the U. S. Fish and Wild Life Service as a guide, even though these seasons fluctuate and the Fish and Wild Life Service may change them at any time and either shorten or lengthen them, and thereby destroy all conformity with the Unemployment Commission regulation.

“Furthermore, by fixing seasons which are not correct, and which do not reflect the true salmon fishing season, the disputed regulation subjects plaintiff to the payment of considerable sums in

the way of contributions for which neither it nor its employees can obtain any benefits." (Pages 11 and 12 of plaintiff's brief of Jan. 6, 1954, filed in District Court.)

Appellee should be estopped to impeach the very action it requested. Even if the appellee did not request what was actually done, the agency's decision to correlate the benefit seasons with Fish and Wildlife Service open seasons is based upon a reasonable exercise of judgment which should not be set aside.

### Point 3.

**The only possible injury, if any, would be to appellee's seasonal employees and not to the appellee as an employer.**

If the District Court's decision nullifying Regulation No. 10 is sustained, appellee, qua appellee, will in no way be affected thereby; furthermore, approximately \$500,000 in benefits would be paid *to appellee's seasonal employees*, not to the appellee-employer.

It is well established that a suitor may champion only its own rights and not the rights of others. *Hess v. Mullaney*, 213 F. 2d 635, 640; *Sheldon v. Griffin* (9th CCA), 174 F. 2d 382, 384. It is observed herein that *no seasonal employee* or group of employees is complaining about the enforcement of Regulation No. 10. Particularly in point is the case of *Sheldon v. Griffin, supra*, where this Court made the following statement relative to a plaintiff who had not suffered a direct injury as a result of action taken by the Alaska Employment Security Commission giving effect to a new Territorial statute:

“There is nothing in the pleadings or proof to indicate that the plaintiff has a particular right of his own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. To entitle himself to be heard, he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people.” (Citing numerous cases.)

In *Jeffrey Mfg. Co. v. Blagg*, 235 US 571, 576, the Court said:

“Much of the argument is based upon supposed wrongs to the employee . . . No employee is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employees by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of.”

In the case at bar, the appellee was not, nor is, threatened with immediate, direct damage as the result of the enforcement of Regulation No. 10. Only seasonal employees and not the cannery operators will benefit from the nullification of Regulation No. 10, and only bona fide seasonal employees will be restricted to the reception of unemployment benefits if the regulation is declared valid.

**Point 4.**

**Possible higher contributions by employers in lieu of credit ratings not an element of irreparable damages.**

**(a) *Higher Contributions.***

It is sheer speculation to argue that higher contributions will be required of employers if Regulation No. 10 is not declared void. Surely such contributions, even if required, will not be caused by the enforcement of Regulation No. 10. The very purpose of restrictive Regulation No. 10 is to protect the fund, thereby causing a reduction in taxes, if anything. Only the legislature can raise or lower taxes. To issue an injunction based upon such a highly speculative ground appears to be erroneous.

**(b) *Loss of Credit Ratings.***

Under Section 51-5-5(c) ACLA 1949, when the ratio of reserves to taxable payrolls amounts to 10.8%, a surplus is declared. This means that employers who have good employment experience are awarded credits, the net effect of which is to reduce the amount of tax they are required to pay. Following 1946 and beginning with the fiscal year July 1, 1947, due to the healthy balance of the fund, credit ratings in lieu of taxes were issued to the employers. Awarding such credits naturally decreased the fund's balance. The last experience credit ratings were issued for the period up to June 30, 1952. It is Mr. McLaughlin's testimony (R. 125) that the payment of these credits, in addition to the substantial benefits paid to all classes of unemployed during 1952-1953 and not merely the failure to classify the construction

industry employers, contributed to the fund's depletion. However, the District Court has accepted the appellee's argument that Regulation No. 10 should be voided, not because its enforcement will deplete the fund (quite the contrary), but for what appears to be an irrelevant reason, namely, that the construction industry employers were not seasonally classified. We can conceive of no causal connection between the enforcement of the regulation and the fund's steady depletion. Appellee's primary complaint is not against what was done, but only against what was not done between April 7 and July 30, 1953. The enforcement of Regulation No. 10 caused appellee no additional expenses or administrative burdens. (R. 133.) Instead it has increased the possibility of receiving credits. (R. 144, 152, 154.)

#### Point 5.

**Resident salmon industry employees are favored, not discriminated against by the enforcement of Regulation No. 10.**

Only wages earned in Alaska are considered in determining benefits. (R. 134.) Hence, resident Alaskans, far from being discriminated against, are, if anything, favored by Regulation No. 10, since residents have greater opportunities than non-residents to earn more wages in Alaska over a twelve-month period and thus achieve the more favorable non-seasonal status. (R. 135, 136.)

#### Point 6.

**Intervenor Wilson as a non-seasonal employee was not injured.**

Intervenor Wilson is forced to admit that, as a non-seasonal employee, the enforcement of Regulation



No. 10 would in no way injure her. This is evidenced by the following statement found on page 6 of plaintiff's brief of April 27, 1954, filed in the District Court:

“... since she was now employed in a laundry she would probably be taken out of the seasonal class and placed in the non-seasonal class and, therefore, *she will no longer be injured* by the fact that the seasonal regulation, as applied to her, is unrealistic. However, the record shows on its face that she is irreparably injured if the provisions of Chapter 99 of the Laws of 1953 are not enforced.” (Italics supplied.)

This startling admission that the intervenor will no longer be injured by the enforcement of Regulation No. 10 eliminates all possible grounds justifying an injunction against the enforcement of Regulation No. 10 in favor of the intervenor. The intervenor has frankly admitted that the enforcement of Regulation No. 10 in no way causes irreparable damage but that the alleged failure of the Commission to carry out the provisions of Chapter 99 between June 24, 1953, and July 30, 1953, is the factor that is threatening irreparable damage. However, the trial Court ruled that intervenor was irreparably damaged, based upon the following grounds:

“It appears, therefore, that although the plaintiff is required to contribute proportionately to the ... Fund, the fund is disbursed largely for the benefit of those who become entitled to disproportionate benefits solely by reason of being treated as non-seasonal when in fact their employment is seasonal, and that the payment of such benefits is

causing the depletion of the funds, to the prejudice of the plaintiff and intervenor.” (R. 53.)

Thus it can be seen that the Court has accepted the appellee’s irrelevant and erroneous contention that the failure of the Commission to classify other allegedly seasonal employers has caused the depletion of the fund to the prejudice of the plaintiff and the intervenor. The fund’s balance as of April 24, 1954, was \$4,380,000.00. (R. 44.) Section 5 of Chapter 99 SLA 1953 establishes a \$2,000,000 base, below which benefits shall not be paid which shall exceed twenty dollars a week. Thus the Court’s position is that, in the years to come, the fund may be depleted to \$2,000,000 because of the Commission’s failure to classify the construction industry and therefore possibly reduce intervenor’s potential benefits to a figure below \$20 a week.

The extreme remoteness of such a possibility is indeed an unsatisfactory ground upon which to issue an injunction against a beneficial public regulation.

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## ISSUE II.

### THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE APPLIES HEREIN.

#### Point 1.

Chapter 99 requires that administrative appeal be taken within 15 days after a determination of seasonality. Appellee’s failure to so appeal should preclude injunctive relief.

Section 7(c)(2) of Chapter 99 SLA 1953 states, in part:

“Prior to June thirtieth each year, a written determination declaring the employer to be seasonal and specifying the period of seasonal operation shall be forwarded to the employer involved. Notice of the determined season shall be forwarded to any representative of individuals in the employment of such employer and of whom the Commission has knowledge. Within fifteen days after the date of mailing or handing such written declaration, the employer or other interested party may appeal from such determination . . . the Commission may affirm, modify, or set aside such determination, and such action of the Commission shall be deemed conclusive unless further appeal is initiated as provided in Section 51-5-7(h) herein.”

Section 51-5-7(h) states:

“Any decision of the Commission in the absence of an appeal therefrom as herein provided shall become final thirty days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his administrative remedies as provided by this Act.”

Appellee was individually determined to be a seasonal employer and was personally notified of that fact in writing. (R. 32.) On the face of the written notice, which the appellee admitted it had received, was this warning:

“. . . this determination shall become final unless the employer or other interested party shall appeal to the Commission (stating therein why the

determination is appealed), within 15 days.” (Defendant’s Exhibit “B”).)

Appellee did not so appeal (R. 33). Instead, on July 30, 1953, the appellee filed this suit for an injunction. This premature resort to the Courts appears to be fatal. *Myers v. Bethlehem Shipbuilding Corp.*, 303 US 41; *Abelleira v. District Court of Appeals*, 109 P. 2d 942, 949; *Oklahoma Pub. Welfare Comm. v. State*, 105 P. 2d 547. The authorities further hold that where a statute expressly directs an administrative appeal as a condition to judicial relief, remedy by mandamus will be expressly denied. *Lichten v. Eastern Airlines*, 189 F. 2d 939, 25 ALR 2d 1337 (1951). The appellee gave the following reasons, unsupported by a single authority, for not appealing the seasonality classification to the Commission:

“We grant that where there is an administrative remedy provided in the law an aggrieved party must exhaust that remedy before coming into a court of equity . . . but none of the cases he cited deals with an action brought to declare an order or regulation to be void when made by one wholly without authority.” (Page 5 of Appellee’s Brief of November 28, 1953, filed in the District Court.)

This reason for short-circuiting administrative procedure is insufficient in law. The rule appears to be that even when it is contended that a regulation is made without authority, the administrative remedy must be exhausted. *United Fuel Gas Co. v. Railroad Comm.*, 278 US 300, 309-310; *Miles Laboratories v. Fed. Trade Com.*, 140 F. 2d 683, 685; *La Verne Co-op.*

*Citrus Ass'n v. U. S.*, 143 F. 2d 415, 419 (9th CCA); *Chicago v. O'Connell*, 8 ALR 916, 919; *Smith v. Duldner*, 175 F. 2d 629, 631.

Appellee advanced three reasons why it thought the doctrine should not be applied to this case (R. 33):

(1) appellant's authority to promulgate regulations had expired, thus the regulation was void;

(2) there was no Commission to appeal to;

(3) an appeal would have been futile, since the Commission became deadlocked by reason of a tie vote on every major issue.

The trial Court specifically rejected each and every one of these reasons in the following language:

"The last contention may be disposed of by the observation that the application of the doctrine does not depend on what may be said in retrospect. Here, as in analogous situations, diligence is the criterion. The remaining contentions are in my opinion untenable for, apparently, the new members of the Commission had qualified, and in any event an appeal may be prosecuted although the appellate tribunal is not in session.

"But although these contentions would ordinarily be without merit, they may yet be considered in determining whether the circumstances of this case are such as to warrant the conclusion that the doctrine should not be applied." (R. 48.)

The Court thereupon advanced the following four reasons in support of its holding that the doctrine should not be applied (R. 50, 51):

(1) that the director issued a regulation pursuant to a power delegated to him that was non-delegable in nature;

(2) that the regulation is invalid since

(a) it selects one seasonal industry and fixes the seasonal periods therefor, whereas the law requires the determination of seasonal periods for all employers;

(b) it classified salmon industry employers on an industry-wide in lieu of an individual employer basis;

(c) it was adopted without notice and afforded appellants no opportunity to be heard;

(d) it is discriminatory in its application and operation;

(3) that the Commission is deadlocked on all major issues;

(4) that the remedy is judicial rather than administrative.

The Court cited no authorities in support of its first three reasons. A law school review was cited in support of the fourth.

It is appropriate to analyze and determine the validity of these four reasons:

*Reason No. 1: Was the executive director vested with delegative authority to make a determination and issue a seasonal regulation?*

In support of a negative answer to this question, the Court stated that the determination of seasonality and

issuance of a regulation setting the seasonal periods are non-delegable powers, and therefore, "It is inconceivable that the exercise of this function would be delegated." (R. 50.)

It appears, however, that the legislature intended the power to be delegated. That a delegation was intended to be made in the first instance is borne out by Section 7(c)(2) of Chapter 99 which provides, in part, that:

"An appeal shall be made *to the Commission* stating therein why the determination is appealed." (Italics supplied.)

This section implies that the original determination may be made by someone other than the Commission, i.e., the executive director.

It is therefore appropriate at this junction to trace the executive director's authority to make a seasonal classification and thereafter issue a regulation setting the benefit periods.

Section 51-5-1(f) ACLA 1949 states:

" 'Commission' means the Unemployment Compensation Commission established by this Act *or any person to whom this Commission may delegate its powers and duties.*" (Italics supplied.)

In view of the Territory's immense geographical area, it is understandable why the legislature empowered the Commission to delegate its authority. The meetings of the Commission are many months apart. It relies heavily on the full-time administrative staff, which gathers all statistical data and actually prepares

the Commission's own reports. The legislature recognizes the fact that the executive director must have such delegated authority if the agency is to function (R. 156 and 157).

On November 12, 1938, the Commission made the following delegation of authority to its executive director:

“Regulation 16, wherein power was granted to the Director to make rules and regulations when the Commission is not in session, was adopted. Such rules and regulations are to be in effect in the regular procedure until such time that the Commission at their next meeting either approves or disapproves such rules and regulations.” (R. 161 and 162.)

This delegation was in effect at the time Benefit Regulation No. 10 was issued. The 1938 delegation of authority was exercised on numerous occasions for 15 consecutive years. The Commission immediately preceding the present Commission expressly requested its then acting executive director to promulgate the regulation in dispute in the event the legislature enacted Chapter 99. These instructions were obeyed. (R. 155-157.)

Appellee makes no attack upon the validity of Section 51-5-1(f), which authorizes the Commission to “delegate its powers and duties.” A delegation was in fact made. The executive director had to promulgate a seasonal regulation on or before June 30th or forever forfeit the possibility of having a seasonality regulation for the next year. (R. 157, 175.) Rather than



further contribute to the depletion of the fund, Regulation No. 10 was issued.

Section 7(c)(2) requires that a written determination be forwarded to the employer prior to June 30th each year. The new Commission did not meet until August, which means, of course, that if the executive director had not issued Regulation No. 10, there would not have been any seasonality regulation for the forthcoming year, thereby opening the fund to \$491,947.00 in claims that would not otherwise be paid. (R. 190.) The new Commission subsequently met on numerous occasions and did not approve or disapprove appellant's action in promulgating Regulation No. 10.

The 1938 delegation of authority to the executive director was his authority to act in behalf of the commission to make initial seasonal classifications and to issue Regulation No. 10.

(a) *The doctrine of simultaneous repeal and re-enactment.*

It is argued that any delegation made by a previous Commission terminated with the enactment of Chapter 82 SLA 1953. The appellee further argued that there was "no authority in the defendant at the time to promulgate any regulation." (Page 8 of plaintiff's Brief of April 27, 1954, filed in the District Court.) The Court sustained this position (R. 64).

This argument and holding warrants close analysis. Chapter 82 SLA 1953 states:

"That Subsection (a), paragraphs (1), (2) and (3), and Subsections (b) and (c) of Section 51-

5-10, Alaska Compiled Laws Annotated 1949, as amended by Chapter 53, Session Laws of Alaska 1949, be and it is hereby repealed.”

A comparison of these repealed sections with those re-enacted by Chapter 83 discloses not only a marked similarity in wording but the identical paragraph and sub-paragraph numbers were re-employed. (App. “E” and “F”.)

Chapters 82 and 83 (House Bills 128 and 129) were passed within minutes of one another. (Pages 923 and 924 of the 1953 Senate Journal, 60th day.)

In view of these facts, the doctrine of simultaneous repeal and reenactment applies. In 50 Am. Jur., Statutes, Sec. 533, page 538, it is set forth as follows:

“The prevailing view, however, is that where a statute is repealed and all, or some, of its provisions are at the same time re-enacted, the reenactment is considered a re-affirmance of the old law, and a neutralization of the repeal, so that the provisions of the repealed act which are thus re-enacted continue in force without interruption, and all rights and liabilities incurred thereunder are preserved and may be enforced.” (See also Sec. 555 of the same volume and section.)

A leading case, *Bear Lake and River Waterworks and Irrigation Co., et al., v. Garland, et al.*, 164 US 1, 11, 12, presents a striking analogy in principle to the case at bar. There under the Utah Mechanics’ Lien Statute of 1888, a claimant was required to commence an action to foreclose his lien within ninety days. The

1890 statute enlarged this time to one year, and expressly repealed the 1888 statute. Much of the claimant's work was done while the 1888 law was in force. He brought his action to foreclose, not within the ninety days allowed by the 1888 statute, but within the year allowed by the 1890 statute.

The Supreme Court of the United States at 164 US 11, 12, made the following observation:

“Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many case the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in *Pacific Mail S.S. Co. v. Joliffe*, 69 U.S. 2 Wall. 459 (7:808). In that case there was a repeal in terms of the former statute, and yet it was held that it was not the intention of the legislature to thereby impair the right to fees which had arisen under the act which was repealed. As the provisions of the new act took effect simultaneously with the repeal of the old one, the Court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and re-

enacting the same as a new and original act.” In accord, *Posadas v. National City Bank*, 296 US 497, 505.

Applying the Supreme Court’s decision herein, the executive director’s authority to promulgate Regulation No. 10 in behalf of the Commission was not abrogated by the repealing statute, Chapter 82 SLA 1953. It follows, therefore, that the director had authority to issue the regulation on June 29, 1953.

(b) *Territorial law authorizes the Commission to delegate discretionary power to its executive director.*

The trial court stated, relative to the delegation of authority, that: “Under the authority delegated, the defendant assumed the exercise of what appears to be a *discretionary power*.” (R. 49.) (Italics supplied.) The Court’s contention that the appellee illegally exercised a discretionary power fails to withstand analysis.

The power to determine the seasonality status of employers within the statutory definition is a function that can be delegated. If the legislature itself can delegate to the Commission the authority to determine seasonality, it also has the authority to authorize the same Commission to re-delegate the same power to its full-time executive director. *State Tax Commission v. Katsis*, 90 Utah 406, 62 P. 2d 120, 107 ALR 1477, 1480. That is precisely what the legislature did herein. By enacting Chapter 99, it authorized the Commission to determine seasonality. Existing statutes also authorized the Commission to delegate its regulation-making

authority (Sec. 51-5-1(f)). The Commission in fact delegated it. These series of events constitutes the foundation of the appellant's chain of authority to make a seasonal determination and issue a seasonal regulation.

*Reason No. 2: The alleged invalidity of the regulation.*

The trial Court gave three specific grounds in support of its holding that the regulation is invalid (R. 50, 51):

(1) the law requires the determination of a seasonal period for all employers; since appellee alone was selected, the regulation is discriminatory in its operation and application;

(2) there was an industry or area classification in lieu of an employer classification as required by law;

(3) Regulation No. 10 was adopted without notice.

*I. Does the statute require the Commission to pass upon the seasonal status of all Alaskan employers and require that seasonal periods be set for each?*

The trial Court asserted that Regulation No. 10 is discriminatory in its operation, in favor of the construction industry, because:

“... it is inconsistent with the law under which it was purportedly made because it selects one seasonal industry and fixes the seasonal periods therefor, whereas the law requires the determination of seasonal periods for all employers, and hence, is discriminatory in its application and operation.” (R. 51.)

The Court further stated:

“Although it can hardly be said that Regulation No. 10 is discriminatory on its face, it is clear that, being limited to only one of the many seasonal industries, its operation and enforcement result in discrimination against all employers in the canned salmon industry and their employees. *The law clearly requires the classification of employers as seasonal or non-seasonal, and it is not perceived how the law could operate fairly or uniformly until this is done.*” (R. 52.) (Emphasis supplied.)

The following is the appellee’s interpretation of Section 7(c)(1) of Chapter 99, as set forth on page 8 of its Brief of January 8, 1954, filed in the District Court:

“... a formula is set forth in Section 7, Subdivision (c)(1) for the classification of employers.

“The Commission itself has no option in the matter now, but under the new law must classify employers themselves as seasonal or nonseasonal, and this is not done by industries as heretofore.”

On April 29, 1954, after trial, the appellee amended its complaint as follows, to allege the newly asserted discrimination theory:

“... that no other seasonal employers in Alaska have been classified as seasonal, and Plaintiff has been discriminated against by that fact.” (R. 201.)

We construe the appellee’s argument, as accepted by the trial Court, as follows:

Chapter 99 requires, as a matter of law, that the Commission declare all employers whose payroll experience meets the 7(c)(1) formula to be seasonal. Hence, the Commission's failure to so declare the construction industry or any of its employers as seasonal between April 30, 1953 and July 30, 1953 (the latter date being the date plaintiff instituted suit herein), while declaring certain cannery employers to be seasonal during said period, constitutes unlawful discrimination. This has caused the fund to become seriously depleted, all to the irreparable damage of appellee, thereby entitling it to an injunction against the enforcement of Regulation No. 10.

It is appellant's contention that, merely because the fund may become depleted because of the Commission's refusal or failure to declare certain construction industry employers as seasonal, it does not follow that Regulation No. 10 should be enjoined.

Also, Regulation No. 10 merely sets seasonal periods for previously classified cannery employers. By itself, it classifies no one. In order to sustain the validity of its contention, which, if done, would still not have any bearing on the validity of Regulation No. 10, the appellee must show that Chapter 99 requires *all* employers whose payroll experience meets the 7(c)(1) definition be deemed seasonal employers. Under this view, the Commission's duty is merely to perform the clerical act of notifying employers of such determination. We think the following analysis will show that the Court erred in accepting this argument.

Does Chapter 99, by operation of law, classify all employers who meet the 7(c)(1) formula?

The following portion of Section 7(c)(2) seems to support a negative answer:

“Seasonal Period and Duration of Determination. In establishing a seasonal period as contemplated herein, the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged.

*“When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation.”* (Italics supplied.)

Following Section 7(c)(1), which defines a seasonal employer, the following language is employed, which appears to vest discretion in the Commission to determine what specific employer shall be declared seasonal:

“No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission.”

This language appears to support our contention that the legislature vested discretion in the Commission. We think the 7(c)(1) definition of a seasonal employer was intended to be a mere guide to the Commission in the exercise of its discretion in determining who is and who is not a seasonal employer. After read-



ing the *whole of Section 7*, it is fairly apparent that merely by defining what constitutes a seasonal employer, the legislature did not intend thereby to have every employer who met the mathematical formula automatically tagged as seasonal. Such a construction is impractical and does violence to other provisions of the law as hereinafter pointed out. (R. 228, 244.)

Furthermore, it was a physical impossibility for a Commission (which had its first meeting on August 6, 1953), to pass upon the seasonality status of the many thousands of Alaskan employers, construction and otherwise, between April 7 and July 30, 1953.

Therefore, it is difficult to perceive how it can be held that the appellee was discriminated against when it was literally impossible to classify *all* construction industry employers prior to the time appellee filed suit herein, i.e., July 30, 1953.

The Court's construction of Section 7 results in a repudiation of long established administrative practices under similar statutes since 1937. Since that year the various Commissions, as Mr. McLaughlin would have testified if permitted (R. 219), had acted upon the assumption that the statutes vested discretion in the Commission in determining what employers should be seasonally classified. This is only common sense, since there may be instances when a normally non-seasonal employer, due to a layoff or emergency, may meet the payroll decline definition. The phrase, "Until such determination by the Commission no occupation or industry shall be deemed seasonal," used since 1937,

in Section 51-5-2(c)(1), is virtually identical to that clause in Section 7 (c)(1) of Chapter 99 SLA 1953, which states: "No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission." Chapter 4 SLA 1937 Section 3(c)(1)(Extraordinary Session) also states:

"As used in this sub-section the term 'seasonal industry' makes an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than forty weeks in a calendar year. The Commission shall after investigation and hearing, determine . . ."

In 1939, Chapter 4 was amended by Chapter 1 Section 12 of the SLA 1939 to read:

". . . 'Seasonal industry' means an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than one year in length. The Commission shall, after investigation and hearing, determine . . ."

Under the trial Court's interpretation of Chapter 99, any employer who temporarily ceased operations for remodeling or retooling, for example, would, if his payroll decline met the 7(c)(1) definition as the result of such shutdowns, be by operation of law a seasonal employer. The Commission would therefore have no authority to grant relief to such an employer from the seasonal classification. We think the legislature did not intend such inflexibility. That is why it employed language stating that no employer shall

be deemed seasonal unless and until so determined by the Commission.

In view of the fact that the past Commissions have operated on the assumption that they had discretion in these matters, the utmost respect should be given to such long established administrative practices. 42 Am. Jur. Pub. Adm. Law, Secs. 77, 78. Further supporting the appellant's contention that the statute vests discretion in the Commission is that language in Section 7(c)(2) which states that:

“... the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged.”

If the District Court's decision that any employer who meets the 7(c)(1) definition *must* be declared seasonal is sustained, then this language would seem to be surplusage. In authorizing the Commission to consider data relating to the best practices of the industry, discretion is implied.

The Court has in effect ruled that, if any employer meets the statutory definition of seasonal employer, it must be seasonally classified. Under this theory the Commission need only secure the payroll record of the employer, match it with the statutory definition of a seasonal employer and thereupon notify him of his status. This is a mere mechanical procedure which does not take into consideration data relating to the best practices of the industry. Such a robot-type approach to the seasonality problem, which is indeed

involved and complicated, is completely foreign to the spirit of the statute. Mr. Moore, the construction industry representative, clearly demonstrated the fallacy of such a mechanical approach to the seasonality problem. (R. 244.)

It has been shown that the appellee requested to be classified as a seasonal employer, whereas construction industry employers have requested not to be. (R. 174, 217, 218.) This is not a case where one employer was selected from a class and thereupon arbitrarily classified against its will. Previous Commissions, after hearing evidence concerning the seasonality status of the construction industry, determined that it would not seasonally classify the same. (R. 126, 130, 142, 151, and pp. 28 and 29 of Defendant's Exhibit "E".)

II. *Did the determination and/or regulation classify the salmon industry on an industry-wide instead of an employer-unit basis?*

The following excerpt from the Court's opinion discloses that it erroneously construed the regulation as one that classified on an industry-wide basis:

"It not only appears that the regulation ignores the mandate of the law that all employers and employing units be classified as seasonal and non-seasonal and the seasonal periods for each established, but also that the regulation classifies the canned salmon industry not by employers or units thereof, but by areas and open seasons as established by the Fish and Wildlife Service . . ."  
(R. 50.)

Appellee has again and again asserted as a ground for the invalidity of the regulation that the same designates the salmon industry as seasonal rather than individual cannery employers as seasonal.

The fact is that Regulation No. 10 designates no one as seasonal. It merely sets the seasonal periods during which previously determined seasonal employers must report their payroll earnings.

Examination of the following wording from the Regulation itself *conclusively proves this point*:

“The Commission accordingly prescribes:

“I. Seasonal Periods for the Calendar Year 1953 for *Certain Employers Engaged in the Canning of Salmon Taken in the Operating Area Designated . . .*”

“II. Reporting by Seasonal Employers:

“Employers *having been determined* by the Commission to be seasonal employers *and so notified . . .*” (Emphasis supplied.)

The declaration of the seasonality status of the appellee's seasonal determination herein was made on an individual basis. In accordance with Section 7(c) (2), the Commission issued a regulation specifying the seasonal periods during which benefit payments to the employees of these seasonal employers shall be made.

The District Court erred in accepting the appellee's argument that Regulation No. 10 declared the entire salmon industry instead of individual employers therein as seasonal. Regulation No. 10 itself is merely

the final step of the following three-step procedure in determining the seasonality status of various employers:

Step 1. The gathering of the necessary data by the Commission, taking into consideration the best practices of the industry in determining who is seasonal;

Step 2. Notifying the individual employer of his seasonal determination;

Step 3. The promulgation of a regulation in accordance with Section 7(c)(2), below quoted, specifying the seasonal periods during which benefits shall be paid to the employees of previously seasonally determined employers:

“When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation.”

III. *Was Regulation No. 10 adopted without required legal notice and without affording the appellees an opportunity to be heard?*

The Court said that Regulation No. 10:

“... was adopted without notice and without affording those concerned an opportunity to be heard, as prescribed by Section 51-1-11(b) ...”

The Court no doubt meant 51-5-11(b) and not 51-1-11(b). Section 51-5-11(b) states, in part:

*“General and special rules may be adopted, amended or rescinded by the Commission only after public hearing or opportunity to be heard thereon . . . Regulations may be adopted, amended, or rescinded by the Commission and shall become effective in the manner and at the time prescribed by the Commission . . .”* (Italics supplied.)

It is apparent that the above section distinguishes between rules and regulations. Since Regulation No. 10 is in the latter category, the Commission may declare the same to be executed in the manner prescribed by the Commission as authorized by Section 51-5-11(b).

Section 7 of Chapter 99 employs the following language relative to hearings:

*“In establishing a seasonal period . . . the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged.”*

It appears, therefore, that hearings were not a condition precedent to the validity of the regulation, but were only necessary when the Commission lacked sufficient payroll data.

The plaintiff admitted receiving actual written notice of the regulation. (R. 32.) The Commission had previously held hearings concerning seasonality in the salmon industry and had in its files the payroll data necessary to determine the seasonality status of the various industry employers. (R. 181, 182.)

*Reason No. 3: Is the possibility of a deadlocked Commission relevant on the question of the application of the exhaustion doctrine?*

The Court disposed of the appellee's contention that it was excused from appealing to the Commission, because it was always deadlocked, by the following statement:

"The last contention may be disposed of by the observation that the application of the doctrine (administrative remedies) does not depend on what may be said in retrospect. Here, as in analogous situations, diligence is the criterion." (R. 48.)

Continuing further in its opinion, the Court stated:

"While the fact that the Commission has been unable to function since its organization, because of the deadlock referred to, would ordinarily be irrelevant on the question of whether administrative remedies have been exhausted, it is nevertheless a circumstance . . . in determining whether the rule ought to be applied." (R. 51.)

We have failed to find any authorities that consider the fact of a deadlocked Commission as even a circumstance in the application of the doctrine. In *Oklahoma Pub. Welfare Comm. v. State*, 105 P. 2d 547, 551, it was held that the mere fact that the plaintiff thinks that an appeal would be futile is no reason to short-circuit administrative procedures. *Abelleira v. District Court of Appeal*, 109 P. 2d 942, 953. The Alaskan legislature intentionally set up a four-man



Commission. The legislature's reasons for such a Commission are as follows (pages 921-922 of the Senate Journal, 21st Session, 60th day):

"The Governor finds fault with the judgment of the Legislature in creating a four-man Commission to consist of 2 representative of labor and 2 representatives of management. It is conceivable that deadlock might occur on some occasion in the promulgation or interpretation of regulations. All four members are charged with carrying out the mandates of law, and it is assumed that all members will apply themselves conscientiously in fulfilling this responsibility. As a matter of practice, it is well known that not all members attend all meetings of boards and commissions and it may be expected that, as frequently as not, a quorum of three members of the Commission will be transacting the business of the Commission. Experience shows that, as frequently as not, in the case of three or five man boards or commissions, one member may be absent leaving a quorum of even numbers, yet few complaints that the business of the Territory was brought to a standstill from such a condition have been heard."

In view of the fact that the legislature deliberately created such a Commission and considering the rule that alleged futility of appeal is no excuse for failing to exhaust administrative remedy, it would appear that the exhaustion doctrine applies, thereby precluding injunctive relief.

*Reason No. 4: Is the matter of the remedy sought herein judicial rather than administrative?*

The Court ruled that it was judicial:

“Indeed the very nature of the problems presented poses the question whether the remedy is not judicial, rather than administrative, to which the doctrine of the exhaustion of remedies would not apply. In view of the circumstance of this case, I am of the opinion that the doctrine should not be applied. 39 Cornell Law Quarterly 285; Gonzales v. Williams, 192 U.S. 1; U. S. ex rel. DeLucia v. O'Donovan, 178 F.2d 876; Breiner v. Wallin, 79 F. Supp. 506, 507-8.” (R. 51, 52.)

In 39 Cornell Law Quarterly 283, this pointed statement is made:

“... the fact that the agency was incompetent to rule on the only action to which the petitioner objected was an important factor in excusing exhaustion.” (*Tomlinson v. U.S.*, 94 F. Supp. 854.)

The appellee's complaint that the regulation was unrealistic would have no doubt been considered and resolved if the new Commission were only given an opportunity to pass upon the same. Instead, the appellee sought judicial relief even before the new Commission met. Evidence that the question herein is essentially administrative in nature and not judicial is manifested by the following statements of appellee:

“... that the regulation does not clearly determine seasonal employment . . .” (Page 7 of appellee's complaint.)

“ . . . the plaintiff's interest in this case is to establish seasons in the salmon canning industry, which has been declared to be seasonal, which correspond with the actual season and the periods . . . for which contributions are made by the employer, without discrimination as to residence of employees . . . ” (Pages 2 and 3 of plaintiff's Affidavit in Opposition to Defendant's Motion for Summary Judgment.)

It is therefore evident that all appellee seeks is to correct an allegedly improper regulation. This is most surely a question of fact which the Commission should first pass upon.

We can perceive of no one more capable of determining the appellee's desire to establish seasonal periods in the salmon industry that correspond to the actual seasons than the Commission itself. Thus, in accordance with the principle of the *Gonzales* case, the appellee should be required to first present its complaints to the Commission and then if dissatisfied with their decision, pursue a judicial appeal.

The Cornell article at page 285 further states:

“The courts should be more ready to excuse exhaustion when the injury involves a basic personal right, than when a large corporation is claiming monetary loss.”

In *Ex Parte Fabiani*, 105 F. Supp. 139 (E. D. Pa., 1952), the Court was of the opinion that a draft board acted in an arbitrary manner, without any basis in fact, and held that the petitioner was not precluded from a judicial review of the board's

action. In the case at bar, however, a large nonresident corporation, which neglected to initially present its complaints to the Commission, now seeks to invalidate a regulation that is designed to and in fact does preserve the trust fund. There is not even any board action for the Court to review herein.

As in the *Gonzales* case, the *DeLucia* decision condoned a short-circuit because, as stated at page 285 in the article, “. . . the injury to the complainant was a severe personal deprivation of rights . . .” Certainly herein the appellee is being deprived of no personal rights due to the enforcement of Regulation No. 10. The *United Fuel Gas Co.* and *Wallin* cases support the rule that exhaustion is excused when the administrative action is “blatantly wrong.” In both of these cases it was observed that the action of the Commission was clearly out of bounds.

An examination of Regulation No. 10 discloses that it is in strict accordance with Section 7(c)(2) of Chapter 99, wherein the Commission is authorized to issue a regulation specifying the seasonal periods during which benefits shall be paid. That is precisely what Regulation No. 10 does. It, notwithstanding the trial Court’s ruling, *does not* determine the seasonal classification, as such, of any employer, employing unit or industry. There is no factual or legal basis for the District Court’s ruling that the regulation is in blatant nonconformity with the enabling statute, Section 7 of Chapter 99.

It is asserted on page 286 of the Cornell article that the Courts do take into account the obvious in-

validity of the agency action and excuse exhaustion when “. . . there is some reason for not exhausting, or some serious injury suffered . . .”

Appellee and intervenor, as heretofore demonstrated, will in no manner suffer injury by enforcement of Regulation No. 10. Only the appellee's seasonal employees will be deprived of benefits for unemployment incurred out of their normal season of employment, by the operation of Regulation No. 10.

Taking all the above factors into consideration, it appears that the matter of the remedy sought herein is administrative rather than judicial and falls within the framework of the following rule set forth in 42 Am. Jur., Pub. Adm. Law, Sec. 201, as follows:

“Where statutory authority to grant a remedy is conferred upon an administrative tribunal as distinguished from a court in the traditional sense of the word, the remedy manifestly is administrative, within the meaning of the doctrine of exhaustion of remedies.” *Oklahoma Pub. Welfare Comm. v. State*, 187 Okla. 654, 105 P. 2d 547.

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### ISSUE III.

**THE TRIAL COURT COMMITTED SERIOUS ERROR IN JUDICIALLY NOTING THAT THE ALASKAN CONSTRUCTION INDUSTRY IS SEASONAL, SAVE KETCHIKAN AND VICINITY.**

#### Point 1.

**The prerequisites for judicial notice were not fulfilled.**

The Court, from the bench, made the following ruling:

“ . . . the court has taken judicial notice of the fact that the construction industry is seasonal.” (R. 216.)

In its written opinion the Court stated:

“ . . . it would take judicial notice of the fact that outside construction work in the Territory, except in Ketchikan and vicinity, is limited by weather to the period from May to October, and is, therefore, seasonal in fact.” (R. 44, 45.)

The three material requisites that must be met in order to authorize judicial notice are set forth in 20 Am. Jur., Evidence, Sec. 17, as follows:

- “(1) The matter must be a matter of common and general knowledge;
- (2) it must be well and authoritatively settled and not doubtful and uncertain;
- (3) and it must be known to be within the limits of the jurisdiction of the court.”

In view of the previous Commission's finding and Mr. Moore's statement that neither the construction industry nor its employees are seasonal (R. 126, 228, 232, 241, 252 and pp. 28 and 29 of Exhibit “E”), it is difficult to understand how the common knowledge requirement was satisfied.

It also appears that Requirement No. 2 was not satisfied herein. Not only is the question of seasonality in the construction industry (outside construction included) not settled, but it can be said with a conservative sense of safety that the issue is one of notorious acrimony and disagreement. For example, compare the Court's statement (R. 213)

and Mr. Moore's testimony (R. 228). The prior Commission expressly found the construction industry, outside dirt removers included, not to be subject to seasonal classification. (R. 130, 151.) Appellant's offer of proof, if accepted, would have at the very least shown that honest and conscientious persons conversant with the problem feel that a sizeable portion of the construction industry is not seasonal in fact. (R. 224-228.) Yet, in the teeth of these considerations, the District Court took judicial notice that *all outside construction work in Alaska, save Ketchikan and vicinity, is seasonal in fact*. The effect of taking such notice was to excuse appellee from the impossible burden of showing that the construction industry, or a majority of its employers, are seasonal. The trial Court, therefore, appears to have committed prejudicial error.

#### Point 2.

**Appellant's offer of proof, if accepted, would have shown that a substantial portion of the construction industry employers are not seasonal and that there exist valid reasons why they should not be seasonally classified.**

As an examination of the pleadings indicates, the appellee's basic complaint was, initially, and throughout all preliminary proceedings, directed toward alleged discriminatory operation of Regulation No. 10 *within* the canned salmon industry, in that it allegedly discriminated in favor of non-residents over residents and failed to seasonally classify so-called "long season" employees while classifying "short season" employees. However, after the trial, the District Court permitted the appellee to amend its complaint to

allege that the Commission's failure to classify other seasonal employers in Alaska constitutes unlawful discrimination as against the cannery operators. (R. 201.) The appellant thereupon requested that it be given an opportunity to show why construction industry employers were not classified. (R. 202, 203). The Court refused this request by rejecting appellant's offer of proof, which, if considered, would have demonstrated that there exist valid reasons for not seasonally classifying construction industry employers. (R. 130, 228, 232, 241, 252; defendant's Exhibit "E", pp. 28, 29.) It would also have shown that the legislature intended to vest discretion in the Commission regarding seasonality classification and that Mr. McLaughlin's staff drafted Chapter 99 and that their basic intent was to vest discretion in the Commission. (R. 219.)

The reason for the Court's rejection can be traced to its interpretation of the statute that all allegedly seasonal employers must be classified and that the construction industry is seasonal and it is therefore impossible for anyone to show that it is not. This interpretation should not be sustained in the face of long established administrative practice to the contrary, findings of previous Commissions relative to the seasonal nature of the construction industry, and Mr. Moore's uncontroverted testimony that the construction industry, or at least numerous employers thereof, are not seasonal in fact.



### CONCLUSION.

Alaska is plagued with the problem of how to prevent excessive unemployment payments to seasonal employees. If the Territory were required to pay full benefits to seasonal employees while they are normally unemployed during the winter season, the trust fund would soon be depleted.

To prevent such a result, the seasonality concept was devised. Under this plan seasonal employees are paid benefits only when unemployed during their normal season of work. This policy is designed to preserve the fund, since no payments will be made for unemployment occurring during the winter season.

In 1953, the Alaska legislature enacted Chapter 99 SLA 1953. Section 7 thereof embodied the seasonality principle. The Act differed from preceding seasonality statutes in approach only. Previously, the law provided that the Commission could determine seasonality status of employers on an area or industry-wide basis. Section 7 provides for a determination of seasonality on an individual unit or employer basis. For example, part of Section 7(c)(1) reads as follows:

“No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission.”

In order to carry out seasonality, the Commission, in June of 1953, through its acting executive director, sent notice to the appellee advising that it was determined to be a seasonal employer. On June 29, 1953, the executive director, representing the Commission,

issued Regulation No. 10. It specified the seasonal period during which benefits would be paid to seasonal employees, whose employers were previously determined to be seasonal. This regulation, as an act separate from the prior determination of seasonality, was issued pursuant to the statutory mandate found in Section 7(c)(2) of Chapter 99, which reads, in part, as follows:

“When the Commission has found and determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries . . .”

The heart of the appellee's attack against the regulation appears to be two-fold.

First. The regulation is unrealistic in that it establishes benefit seasons in the salmon industry which do not correspond with the actual operational season.

Second. That no other allegedly seasonal employers in Alaska have been classified as seasonal and plaintiff has been discriminated against by that fact.

Section 7 of Chapter 99 explicitly sets forth the administrative remedy in cases where persons affected by the seasonal regulation are dissatisfied with the same. Appellee deliberately by-passed the Commission. It did not give that body an opportunity to consider the allegation that the regulation is factually unrealistic in its establishment of benefit seasons or whether other allegedly seasonal employers should be classified. Under these circumstances, it appears that

the doctrine of exhaustion applies, precluding the appellee from judicial relief.

The discrimination charge is without merit for at least two reasons.

First. Alaska law, particularly Section 7 of Chapter 99, is not a compulsory mandate that all employers who meet the statutory definition of a seasonal employer are seasonal employers in fact. The new law, as its predecessor, permits the Commission to exercise discretion classifying employers. Since such discretion exists, there can't possibly be discrimination under the facts of this case.

Second. An unreasonably short length of time elapsed between the effective date of Section 7, and the date appellee filed suit, in which to investigate and determine the seasonal status of all other Alaskan employers. Under appellee's theory the only manner by which the Commission could have avoided a charge of discrimination was to seasonally classify all other Alaskan employers at the same time it was classified. The unreasonableness of this position demonstrates its lack of merit.

The failure to prove threatened irreparable damage by either appellee or intervenor resulting from the enforcement of the regulation precludes equitable relief. The record discloses that the enforcement of the regulation not only preserves the fund, but enhances the possibility of appellee receiving experience rating credits. (R. 144, 154.)

By taking judicial notice that the Alaskan construction industry is seasonal, the Court in effect ruled that every single employer in the Alaskan outside construction industry, save Ketchikan and vicinity, is a seasonal employer as that term is defined by Section 7 of Chapter 99. The manifest error of such an arbitrary ruling becomes apparent by citing one out of many possible exceptions thereto, i.e., the year round construction of the Eklutna project near Anchorage. (R. 232.) In addition, this ruling, by fiat, declares as an undisputed fact a matter that is the subject of bitter controversy and on which reasonable men disagree.

For these reasons it is respectfully requested that the decree authorizing the permanent injunction be set aside and the injunction dissolved.

Dated, Juneau, Alaska,  
January 21, 1955.

J. GERALD WILLIAMS,  
Attorney General of Alaska,

EDWARD A. MERDES,  
Assistant Attorney General of Alaska,  
*Attorneys for Appellant.*

(Appendices "A" to "G" Follow.)

## **Appendices.**



## Appendix "A"

---

### REGULATION 10.

#### ESTABLISHING SEASONAL PERIODS AND PROVIDING FOR PAYMENT OF BENEFITS TO SEASONAL WORKERS.

Section 51-5-2(c) Alaska Compiled Laws Annotated 1949 as amended by Section 7, Chapter 99, Laws of 1953, provides:

"(2) . . . When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation . . ."

The Commission accordingly prescribes:

# I. SEASONAL PERIODS FOR THE CALENDAR YEAR 1953 FOR CERTAIN EMPLOYERS ENGAGED IN THE CANNING OF SALMON TAKEN IN THE OPERATING AREA DESIGNATED.

OPERATING AREA <sup>1</sup>	SEASONAL INCLUSIVE DATES	SEASONAL CODE
Yukon	May 30 to September 5	19
Bristol Bay	June 20 to August 1	20
Alaska Peninsula and Cook Inlet	May 23 to August 8	21
Chignik and Kodiak	June 13 to August 15	22
Resurrection Bay	June 27 to October 3	23
Prince William Sound	July 12 to August 29	29
Copper River and Bering River	April 25 to September 26	24
Yakutat	May 30 to October 3	25
Southeastern:		
Icy Strait, Eastern (except Taku River and Port Snettisham) and Western Districts	June 13 to August 29	27
Stikine District, and Taku River and Port Snettisham in Eastern District	(May 2 to June 12 (June 13 to August 29 (August 30 to October 3	26 27 28
Sumner Strait, Clarence Strait, South Prince of Wales Island and Southern Districts	July 12 to August 29	29

<sup>1</sup>Operating Areas herein are as more particularly described in regulatory announcements of the U. S. Fish & Wildlife Service.

## II. REPORTING BY SEASONAL EMPLOYERS.

Employers having been determined by the Commission to be seasonal employers and so notified shall re-



port the amount of wages payable to individuals in their employ within the inclusive dates of the seasonal period established by the Commission as distinguished from wages payable for employment before or after such established season.

### III. BENEFIT PAYMENTS TO SEASONAL WORKERS.

A seasonal worker is one who has base period wage credits of which at least eighty percentum have been earned in seasonal employment. Benefits shall be payable to seasonal workers only on account of unemployment occurring during the seasonal period applicable to such unemployment as designated in paragraph I herein.

Pursuant to the appropriate provisions of the Alaska Employment Security Law (Section 51-5-1 to 20 ACLA 1949, as amended) and in accordance with the authority vested in me, I, John T. McLaughlin, the duly qualified and acting executive director of the Employment Security Commission of Alaska, do hereby adopt the foregoing regulation, designated as Regulation 10, and prescribe that the same shall take effect July 5, 1953, superseding former Regulation 10 dated October 16, 1952.

Dated at Juneau, Alaska, this twenty-ninth day of June, 1953.

John T. McLaughlin  
Executive Director  
Employment Security Commission  
of Alaska

## Appendix "B"

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### CHAPTER 5.

#### ALASKA UNEMPLOYMENT COMPENSATION LAW.

##### Section 51-5-1. *Definitions.*

"(f) 'Commission' means the Unemployment Compensation Commission established by this Act or any person to whom this Commission may delegate its powers and duties."

##### Section 51-5-2. *Benefits.*

"(c) Seasonal employment.

(1) As used in this subsection the term 'seasonal industry' means an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than one year in length. The Commission shall, after investigation and hearing, determine, and may thereafter from time to time redetermine, the longest seasonal period or periods during which, by the best practice of the occupation or industry in question, operations are conducted. Until such determination by the Commission no occupation or industry shall be deemed seasonal."

##### Section 51-5-7. *Claims for benefits.*

"(h) *Appeal to Courts.* Any decision of the Commission in the absence of an appeal therefrom as herein provided shall become final thirty days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any

party claiming to be aggrieved thereby has exhausted his administrative remedies as provided by this Act. The Commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney employed by the Commission and designated by it for that purpose, or at the Commission's request by the Attorney General."

Section 51-5-11. *Administration.*

"(b) *Regulations: General and special rules.* General and special rules may be adopted, amended, or rescinded by the Commission only after public hearing or opportunity to be heard thereon, of which proper notice has been given. General rules shall become effective thirty days after filing with the Secretary of the Territory and publication in one newspaper of general circulation in each of the four judicial divisions of the Territory for such period as the Commission may prescribe. Special rules shall become effective thirty days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the Commission and shall become effective in the manner and at the time prescribed by the Commission."

## Appendix "C"

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### CHAPTER 4, SESSION LAWS OF ALASKA, 1937 (Extraordinary Session).

#### Section 3. *Benefits.*

##### "(c) Seasonal employment.

(1) As used in this subsection the term 'seasonal industry' means an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than forty weeks in a calendar year. The Commission shall, after investigation and hearing, determine, and may thereafter from time to time redetermine, the longest seasonal period or periods during which, by the best practice of the occupation or industry in question, operations are conducted. Until such determination by the Commission, no occupation or industry shall be deemed seasonal."

## Appendix "D"

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### CHAPTER 1, SESSION LAWS OF ALASKA, 1939.

"Section 12. That Chapter 4, Section 3(c)(1), Extraordinary Session Laws of Alaska, 1937, be amended to read as follows:

'Section 3(c)(1). As used in this subsection the term "seasonal industry" means an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than one year in length. The Commission shall, after investigation and hearing, determine, and may thereafter from time to time redetermine, the longest seasonal period or periods during which, by the best practice of the occupation or industry in question, operations are conducted. Until such determination by the Commission no occupation or industry shall be deemed seasonal.' "

## Appendix "E"

CHAPTER 82, SESSION LAWS OF ALASKA, 1953.  
AN ACT

[H. B. 128]

To repeal Subsection (a), paragraphs (1), (2) and (3), and Subsections (b) and (c) of Section 51-5-10, Alaska Compiled Laws Annotated 1949, as amended by Chapter 53, Session Laws of Alaska, 1949.

*Be it enacted by the Legislature of the Territory of Alaska:*

Section 1. That Subsection (a), paragraphs (1), (2) and (3), and Subsections (b) and (c) of Section 51-5-10, Alaska Compiled Laws Annotated 1949, as amended by Chapter 53, Session Laws of Alaska, 1949, be and it is hereby repealed.

*Section 51-5-10. Unemployment Compensation Commission.*

(a) *Organization.* There is hereby created a Commission to be known as the Unemployment Compensation Commission of Alaska. The Commission shall consist of three members, who shall be appointed by the Governor, by and with the consent of the Legislature, as soon as possible after the passage and approval of this Act and thereafter when any vacancy occurs in its membership. During his term of membership on the Commission no member shall serve as an officer or committee member of any political party organization, and not more than two members of the Commission shall be members of the same political party. Each member shall hold office for a term of six years, except that:

(1) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term; and

(2) the term of office of the members first taking office after the date of enactment of this Act shall expire, one February 1, 1939, one February 1, 1941, and one February 1, 1943. The members of the Commission shall be Territorial officers and before entering upon the duties of their office shall take the oath of office prescribed for Territorial officers. The Governor may at any time, after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty or malfeasance in office.

Upon the expiration of the term of a member the Governor shall submit the name of his successor for confirmation by the Legislature then in session; if the Governor fail to submit such name the incumbent shall continue to hold office and shall continue to perform the duties thereof until his successor shall have been appointed and his appointment confirmed by the Legislature as in this Section provided, and no recess or interim appointment shall be made in such case.

(3) The Commission shall appoint a director who shall be the chief executive of the Commission, whose compensation shall be Five Thousand Two Hundred and Fifty Dollars (\$5,250.00) per annum, payable in equal monthly installments; he shall be appointed for a term of four years and may be removed at the pleasure of the Commission. No person shall be ap-

pointed Director unless he is a citizen of the United States, a resident of this Territory and has been such resident at least five years immediately preceding his appointment. The Director shall be subject to the supervision and direction of the Commission and shall perform such duties as the Commission may assign to him.

(b) *Compensation of Commissioners.* One of the members of the Commission so appointed shall be the chairman of the Commission. The members of the Commission shall not receive any fixed salary but shall be paid at the rate of Ten Dollars (\$10.00) per day plus necessary expenses while engaged in the actual performance of their duties but no commissioner shall in any event receive more than One Thousand Dollars (\$1,000.00) salary in addition to expenses for any calendar year. The salaries of all commissioners shall be paid from the unemployment compensation administration fund. The chairman of the Commission shall be designated by the Governor.

(c) *Quorum.* Any two Commissioners shall constitute a quorum. No vacancy shall impair the right of the remaining Commissioners to exercise all of the powers of the Commission. (L Ex Sess 1937, ch 4, § 10, p 51; am L 1941, ch 40, §§ 24, 25, p 110; L 1945, ch 20, § 1, p 72, effective March 19, 1945.)



## Appendix "F"

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### CHAPTER 83, SESSION LAWS OF ALASKA, 1953. AN ACT

[H. B. 129]

To create an Employment Security Commission  
of Alaska.

*Be it enacted by the Legislature of the Territory of  
Alaska:*

Section 1. There is hereby created a commission to be known as the Employment Security Commission of Alaska. The Commission shall consist of four members, who shall be appointed by the Governor, by and with the consent of the legislature, in joint session of both houses, as soon as possible after passage and approval of this Act. Members of the Commission shall be residents of the Territory of Alaska and citizens of the United States, over the age of twenty-one years. Not more than two members of the Commission shall be of the same Political Party. Two members shall be representative of industry or management and two shall be representative of labor. Each member shall hold office for a term of six years, except that:

(1) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of that term; and if a vacancy occurs at a time when the legislature is not in session, through death, resignation, removal or disqualification, under this Act, a new member shall be appointed by the

Governor to fill the vacancy who shall have the qualifications herein prescribed and who shall hold office for the remainder of the term for which his predecessor was appointed; and

(2) The terms of office of the members first taking office after the date of the enactment of this Act shall begin on the date of their appointment and shall expire, one on February 1, 1955, one on February 1, 1957, one on February 1, 1959 and one of February 1, 1961. The members of the Commission shall be Territorial officers, and before entering upon the discharge of their duties, shall take such oaths of office as are prescribed for Territorial officers. The Governor may, at any time, after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance in office, or commission of a crime.

Upon the expiration of the term of a member, the Governor shall submit the name of a successor for confirmation by the legislature then in session; if the Governor does not submit such name, the incumbent shall continue to hold office and to perform the duties thereof until his successor shall be appointed and confirmed by the legislature, as in this section provided, and no recess or interim appointments shall be made in such cases.

(3) The Commission shall appoint a director who shall be the chief executive of the Commission, whose compensation shall be Eight Thousand Five Hundred Dollars (\$8,500.00) per annum, payable in equal

monthly installments; he shall be appointed for a term of four years and may be removed at the pleasure of the Commission. No person shall be appointed Director unless he is a citizen of the United States, a resident of this Territory and has been such resident at least five years immediately preceding his appointment. The Director shall be subject to the supervision and direction of the Commission and shall perform such duties as the Commission may assign to him.

(b) One of the members of the Commission so appointed shall be chosen by all members as Chairman of the Commission. Members of the Commission shall be reimbursed for actual travel expenses and shall receive a per diem allowance for each day that they are away from home in connection with their official duties in carrying out the purpose of this Act. The reimbursement of all Commissioners shall be from the Employment Security Commission administration fund.

(c) Any three Commissioners shall constitute a quorum, and no vacancy shall impair the rights of the remaining Commissioners to exercise all the powers of the Commission.

## Appendix "G"

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CHAPTER 99, SESSION LAWS OF ALASKA, 1953.  
AN ACT

"Section 5. That Sec. 51-5-2(b)(1) ACLA 1949, as amended by Chapter 11, SLA 1951; and Sec. 51-5-2(d)(1), (2) and (3), ACLA 1949, are hereby repealed and a new section in lieu thereof is hereby enacted to read as follows:

(b)(1) Amount of Benefits. Subject to the other provisions of this Act benefits shall be payable to any eligible individual during the benefit year in accordance with the weekly benefit amount and the maximum benefits potentially payable shown in the following schedule for such base period wages shown in the schedule as are applicable to such individual: Provided, however, that said weekly benefit amount shall not exceed twenty dollars per week, and the said maximum benefits potentially payable shall not exceed four hundred dollars, for any individual during any benefit year if the balance in the fund is less than two million dollars on January first of the calendar year in which his benefit year begins . . ."

"Section 7. That Sec. 51-5-2(c) ACLA 1949 is hereby repealed and a new section in lieu thereof is hereby enacted to read as follows:

(c)(1) Seasonal Employer. As used in this section the term 'seasonal employer' means an employer or operating unit of an employer which because of the seasonal nature of its operations, reduces its employment to such an extent that its monthly payroll

for each of three consecutive months in each of two consecutive calendar or operating years immediately preceding the year for which the determination is made, is less than one-half the average monthly payroll for the three consecutive months of highest payroll in the same calendar or operating years. No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the commission. A successor in interest of a seasonal employer or operating unit shall be deemed seasonal upon the same basis as the predecessor unless determined otherwise by the Commission.

(2) Seasonal Period and Duration of Determination. In establishing a seasonal period as contemplated herein, the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged.

When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation.

Employers affected by such regulation shall report on forms provided by the Commission the wages payable to individuals in their employ during the inclusive dates of the seasonal period set by the Commission, as distinguished from wages payable for employment before or after such seasonal period.

Prior to June thirtieth each year, a written determination declaring the employer to be seasonal and specifying the period of seasonal operation shall be forwarded to the employer involved. Notice of the determined season shall be forwarded to any representative of individuals in the employment of such employer and of whom the Commission has knowledge. Within fifteen days after the date of mailing or handing such written declaration, the employer or other interested party may appeal from such determination. An appeal shall be made to the Commission stating therein why the determination is appealed. After affording the parties a reasonable opportunity to submit briefs with respect to the determination appealed from, the Commission may affirm, modify, or set aside such determination, and such action of the Commission shall be deemed conclusive unless further appeal is initiated as provided in Section 51-5-7(h) herein.

(3) Seasonal Employment Defined. 'Seasonal employment' means all employment for a seasonal employer or operating unit within the season determined by the Commission as its operating season. All wages payable by a seasonal employer within such operating season shall be deemed seasonal wages.

(4) Operating Unit. For the purposes of this Act relating to seasonal employment, an 'operating unit' is any unit of an employer's business which frequently is conducted as a separate and independent operation.

(5) Seasonal Worker. 'Seasonal worker' means an individual who has base period wage credits of which at least eighty per centum have been earned in seasonal employment.

(6) Benefit Payments to Seasonal Workers. When the Commission has designated the operations of an employer or an operating unit as seasonal, then benefits shall be payable to seasonal workers employed thereby only on account of unemployment occurring during the regular period of such seasonal employment as designated in Section 51-5-2(c)(2).''





No. 14,505

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

A. B. PHILLIPS, Executive Director,  
Employment Security Commission  
of Alaska,

*Appellant,*

vs.

FIDALGO ISLAND PACKING Co.,

*Appellee,*

CLARA WILSON,

*Intervenor.*

---

**BRIEF FOR APPELLEE.**

---

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Juneau, Alaska,

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and Intervenor.*

**FILED**

**MAR 23 1955**

PAUL P. O'BRIEN, CLERK



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---

**BRIEF FOR APPELLEE.**

---

**STATEMENT.**

Appellant, in his brief, has made a statement of the procedural steps taken in this case in the lower Court, and of that Court's findings; but, for the purpose of aiding this Court at the outset in its consideration of the Record, we submit the following:

This action involves the Alaska Employment Security Law. That law is found in Volume 2, Alaska Compiled Laws Annotated 1949, Sections 51-5-1 to 55-5-20. There were certain amendments made to the law in the years 1949, 1951 and 1953. The title of the

law was changed by Chapter 53 of the Session Laws of Alaska 1949 to the Employment Security Law, and the name of the Commission was changed to the Employment Security Commission of Alaska. We are concerned here with those amendments to the law appearing in Chapters 82, 83 and 99 of the Session Laws of Alaska 1953, and particularly with Section 7 of Chapter 99. (App. A, B and C, pp. i-vii.)

The Commission set up originally by Section 51-1-10 ACLA 1949 consisted of three members. However, Chapter 82 of the SLA 1953 repealed this entire section, 51-1-10 ACLA 1949, and Chapter 83 of the SLA 1953 created a new Commission, consisting of four members. It is conceded that the old Commission was abolished and out of existence and the new Commission had been created by Chapter 83, SLA 1953, at all times during the acts complained of in the complaint of plaintiff and intervenor. (R. 56.)

Then the Legislature in 1953 passed Chapter 99, SLA 1953, making certain amendments to the Employment Security Law of Alaska. These amendments make certain important changes in Sections 51-5-1, 51-5-2, 51-5-3, 51-5-4, 51-5-16, ACLA 1949. (App. C.)

While the old Commission was in existence, for a time Mr. John T. McLaughlin was acting as Executive Director of the Commission; that is, the old Commission. He continued on to act as Executive Director after the old Commission was abolished, and on June 29, 1953, he promulgated a purported Regulation of the Commission known as Amended Regula-



tion No. 10, declaring the salmon industry in Alaska to be a seasonal industry under the provisions of subdivision (c) (1), Section 51-5-2 ACLA 1949, which section had been expressly amended by the provisions of Section 7 of Chapter 99, SLA 1949.

This action was brought by the plaintiff and the intervenor to enjoin the enforcement of Amended Regulation No. 10 as being in violation of Section 7, Chapter 99, SLA 1953, which was the law in effect at the time the pretended Amended Regulation No. 10 was promulgated by McLaughlin. The plaintiff alleged in its complaint that it was engaged in fishing, canning, packing and shipment of canned salmon in Alaska and that it was a member of the Alaska Salmon Industry, Inc., an organization composed of various packers of canned salmon in Alaska, and plaintiff brought the action on its own behalf and on behalf of the Alaska Salmon Industry, Inc., and all its members and all those engaged in the packing of canned salmon in Alaska. (R. 3-4.) The intervenor, Clara Wilson, in her complaint alleged that she was an employee of the Taku Fisheries, Inc., working in the cannery of the Taku Fisheries, Inc., at Juneau, and she realleged and adopted all the allegations of plaintiff's complaint and made them a part of her complaint in intervention by reference thereto, thereby adopting the allegation that the action was brought on behalf of all those engaged in the packing of canned salmon in Alaska. (R. 17.)

After a hearing, a preliminary injunction was entered against the defendant on August 17, 1953. The

case was pending for some time and during its pendency the defendant McLaughlin was replaced as Executive Director by A. B. Phillips, and he was substituted as defendant in place of McLaughlin. (R. 45.) The case was tried before the Court at Juneau on April 27, 1954, and thereafter on April 29, 1954, further proceedings were had before the Court in chambers, and again on May 3, 1954, in open court the defendant made certain offers of further proof which were rejected by the Court.

The Court rendered its opinion on May 7, 1954 (R. 42-54), and on May 12, 1954, entered findings of fact, conclusions of law and a decree permanently enjoining the defendant from enforcing the provisions of purported Amended Regulation No. 10, dated June 29, 1953 (R. 55-67), and holding that purported Regulation to be invalid for reasons stated in the findings and opinion.

Section 51-5-2 ACLA 1949, in subdivision (c), defines seasonal employment as follows:

“(c) Seasonal employment.

(1) As used in this subsection the term ‘seasonal industry’ means an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than one year in length. \* \* \*”

For a number of years the old Commission by regulation declared certain industries to be seasonal because of climatic conditions and the shortness of the seasons during which certain occupations can be

carried on. Those industries which were classified as seasonal included placer mining, whaling, herring meal, oil and saltery industry, lighterage and salmon canning. (R. 121-123.) All these industries were dropped except salmon canning, apparently in 1952. (R. 121.)

Salmon canning in Alaska is carried on, of course, only during the period in the summer months when the fish run, and the seasons vary in different districts from Bristol Bay to the Canadian boundary in Southeastern Alaska.

In carrying on the salmon canning operations thousands of employees are employed during the brief fishing and canning season. A large number of these must necessarily be brought from the states of Washington, Oregon and California, and probably half of them are permanent residents of Alaska. Many of these of course are natives. Some of the workers must necessarily be employed for longer periods than others. For instance, machinists, carpenters, Filipino crew and many others, most of whom come from the States, must come some weeks before the actual canning season, and many workers must remain after the actual canning season is over. Some of these are employed for as long as three or four months, while some of the natives and residents of Alaska who are engaged only for the actual fishing and packing period, which may be only three or four weeks, obtain only that much employment. (R. 87-92.) One of the charges in the complaint and the complaint in intervention is that this pretended Amended Regulation No. 10, in

addition to being made in violation of Section 7, Chapter 99, SLA 1953, in that it classifies industries as such instead of "seasonal employers", was discrimination between these resident employees who are employed only during the actual fishing and packing season in the cannery and those nonresident employees who are also employed in the cannery during the actual canning operations, and in employment incidental to the actual canning operations before the fish are packed and after the fish are packed, thereby placing them in a nonseasonal category, as we shall see hereafter.

For a number of years the old Commission, which had the power then to classify industries as such, established two seasons for cannery employees, namely one called the "long season" and one called the "short season". Then this was changed and only one season was established, which, of course, varied from district to district. The old Commission apparently discussed the necessity for a change in the law, and what is now Chapter 99 was considered by the old Commission and that part of it which defined an employer "as a seasonal employer, an employer taking or processing raw or natural products". The Legislature dropped the phrase "taking or processing raw or natural products" (R. 117) and passed Chapter 99, SLA 1953, which applies seasonality not to industries but to employers and employing units, according to a certain formula.

The plaintiff and intervenor sought and obtained the injunction on the ground that the Acting Director

had no authority to promulgate pretended Amended Regulation No. 10 because of the following reasons:

1. The authority to promulgate such a regulation rested in the Commission and could not be delegated, even if the old Commission had remained in authority or the new Commission had attempted to delegate it.

2. The amended regulation is in violation of Section 7, Chapter 99, SLA 1953, in that it attempts to classify "industries" and not "employers and employing units".

3. The pretended Amended Regulation No. 10 discriminates between different classes of employees engaged in the same work during the same season.

4. The regulation is discriminatory as between seasonal employers in the salmon packing industry and seasonal employers in the construction and other industries who have been classified as nonseasonal.

Plaintiff and intervenor further claimed in seeking the injunction that the application and enforcement of purported Amended Regulation No. 10 will irreparably injure them and all other employers and employees "engaged in the packing of canned salmon in Alaska".

The appellant contended that:

1. The regulation was not void because Acting Director McLaughlin, who attempted to promulgate the regulation at a time after the old Commission had been abolished, was acting under authority delegated to him by the old Commission in November, 1938 (R. 161), and that he still had power to promulgate a reg-

ulation regulating industries, notwithstanding the fact that at the time of the attempted regulation Section 7 of Chapter 99, SLA 1953, was in full force and effect, which section changed the law with reference to classification of seasonal employers.

2. The appellant and intervenor had no standing in Court because they had not first exhausted their administrative remedies by appealing to the Commission from the order of the Acting Director promulgating Amended Regulation No. 10, and

3. The appellee and intervenor have not been irreparably injured.

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### QUESTIONS PRESENTED.

The questions presented on this appeal are as follows:

1. Did Acting Director McLaughlin have power and authority to promulgate and enforce pretended Amended Regulation No. 10?

2. Was plaintiff required to seek administrative remedies, if any existed, before bringing action in the District Court, which question involves the power of the Court to hear and determine the case?

3. Would the appellee, intervenor and those other employers and employees whom they represented have been irreparably injured by the enforcement of pretended Amended Regulation No. 10?

The questions set up by appellant at page 3 of his brief are merged in the three questions above set forth.

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### ARGUMENT.

We shall discuss the questions presented in the order in which they are set forth hereinabove.

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1. DID ACTING DIRECTOR McLAUGHLIN HAVE POWER AND AUTHORITY TO PROMULGATE AND ENFORCE PRETENDED AMENDED REGULATION NO. 10.

The appellant contends that under the authority of subsection (d) of Section 51-5-11, ACLA 1949, the Commission is given authority to appoint, fix the compensation and prescribe the duties and powers of such officers, accountants, attorneys, experts, etc., as may be necessary in the performance of its duties. That subsection contains the following language:

“The Commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this Act \* \* \*”

In November, 1938, the old Commission granted power to the Director

“To make rules and regulations when the Commission is not in session. \* \* \* Such rules and regulations are to be in effect in the regular pro-

cedure until such time that the Commission, at their next meeting, either approves or disapproves such rules and regulations.” (R. 161-162.)

The lower Court held that:

“The determination of seasonality was neither delegated nor intended to be delegated.” (R. 50.)

We do not think that where the Commission is charged in the law with the duty of making determination as to seasonality each year, such authority can be delegated, and we do not think that is what was meant by the action of the old Board in November, 1938. What was meant was that the Director was vested with administrative powers only when the Board was not in session and not with the quasi-judicial powers which had been conferred on the Board by law.

We know in these days many governmental functions are carried on through means of boards and commissions which, because of the increasingly complex nature of our civilization, are necessary. Very often these boards are given, in addition to certain administrative powers, quasi-judicial powers, but surely these quasi-judicial powers cannot be delegated to an employee of a board or commission.

The Board of Education, for instance, has certain powers which are quasi-judicial. It also has administrative powers. It may delegate certain powers to the Commissioner of Education, who is the executive official of the Board, but it certainly could not be said that the Commissioner of Education between sessions of the Board could promulgate and enforce a regula-



tion which would reduce the school year from nine months to two months, or reduce or increase the salaries of teachers, nor could the Board delegate him any such power, although the Board itself possesses that power. It may as well be contended that the Board of Education will have the power to delegate that authority to the janitor.

The lower Court says further in its opinion:

“An examination of the law discloses that the determination of seasonality is not only one of the many important functions of the Commission, but also one that must be performed before the law can become fully operative. It is not conceivable that the exercise of this function would be delegated.” (R. 50.)

Furthermore, there is nothing in the Record to show that any such power had been theretofore delegated to or attempted to be exercised by any Director of the Employment Security Commission.

There is another reason why the Acting Director, McLaughlin, could have no such authority, and that is that even if the authority had been granted him by the old Board to promulgate regulations, which had the effect of law and which had such an important bearing on the whole Employment Security program, the power and authority surely expired with the abolition of the old Commission.

A new law was in effect on June 29, 1953, and that new law provides an entirely new definition of seasonal employer and it sets forth in Section 7, subdivision (c) (1), Chapter 99, SLA 1953, a new defini-

tion and a formula for an exact determination of a seasonal employer. It further provides that:

“No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission.”

This refers to the new Commission which had been created by Chapter 83, SLA 1953. Section 7 above quoted went into effect on April 1, 1953.

Furthermore, if the Acting Director, in promulgating Amended Regulation No. 10, had the power to promulgate it under the old law and under the authority of the old Commission, he still had not complied with the former law, for that law, in Section 51-5-2, ACLA 1949, subdivision (c)(1), provides for investigation and hearing before a determination is made. Therefore, the Acting Director is on very shaky ground when he assumes authority alone for promulgating or attempting to promulgate pretended Amended Regulation No. 10, for if he had the power to act under the authority of the old law, notwithstanding its repeal, he had not given any notice or held any hearing to determine seasonality. If he was assuming to act under the new law, Chapter 99, SLA 1953, he did not act in conformity with the provisions of that law, which places seasonality on an employer instead of an industry basis, and no authority whatsoever could have been delegated by the new Board which did not organize until August 6, 1953 (R. 46), and after organization they did not even appoint Mr. McLaughlin, Executive Director. (R. 175, 189.)

Surely the regulation was void by any test that may be applied.

The present law in plain language specified that seasonality should be on an employer basis and not on an industry basis, and it set up a formula as a basis of classification for all employers. It is significant that Section 7, Chapter 99, went into effect on April 1, 1953, while the remainder of the Act did not become effective until July 5. The reason for this was to give the employees of the Commission three months' additional time in which to make computations under the formula before the end of the benefit year.

The trial Court, in its opinion (R. 46-50), sets forth very clearly the lack of power of McLaughlin to promulgate the attempted regulation.

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**2. WAS PLAINTIFF REQUIRED TO SEEK ADMINISTRATIVE REMEDIES, IF ANY EXISTED, BEFORE BRINGING ACTION IN THE DISTRICT COURT, WHICH QUESTION INVOLVES THE POWER OF THE COURT TO HEAR AND DETERMINE THE CASE.**

Appellant contends that plaintiff and intervenor had no standing in Court to attack the pretended Amended Regulation No. 10 until they had first taken an appeal to the Commission. Appellant argued this point in his application for summary judgment. (R. 79-85.) There is inserted in the Record, pages 76 to 86, the argument of appellant on this application; but the argument of plaintiff and intervenor is absent. So also there has been omitted the remarks of the Court at the conclusion of that argument, and

the Court's ruling on the motion for summary judgment.

The trial Court disposes of this question of the exhaustion of administrative remedies in its opinion (R. 49-52), saying among other things:

“\* \* \* Moreover, even had the time not expired, it would seem wrong to require the plaintiff to exhaust his remedy by way of an appeal in a case in which it would appear that under no circumstances could the regulation ultimately be upheld. Indeed, the very nature of the problems presented poses the question whether the remedy is not judicial, rather than administrative, to which the doctrine of the exhaustion of remedies would not apply. In view of the circumstances of this case, I am of the opinion that the doctrine should not be applied. 39 Cornell Law Quarterly 285; *Gonzales v. Williams*, 192 U.S. 1; *U. S. ex rel. DeLucia v. O'Donovan*, 178 F. 2d 876; *Public Utilities Commission v. Gas Company*, 317 U.S. 456; *Breiner v. Wallin*, 79 F. Supp. 506, 507-8.  
\* \* \*”

There are additional reasons why no exhaustion of administrative remedies was involved in this case; reasons not mentioned in the trial Court's opinion. We shall briefly discuss those reasons. First: the Amended Regulation was void and made by one without power or authority to make it. There was a new Commission appointed. It had no connection with McLaughlin. So far as the pretended Regulation goes, it may as well have been made by a man in the street, and if so made and attempted to be enforced, no appeal need be taken to any Commission and the

Courts had full power to enjoin the enforcement, where that enforcement was threatened and would result in irreparable injury to anyone. McLaughlin had not been appointed Director or Acting Director by the new Commission, which was already in existence on June 25, 1953, or by its members. He has never been appointed. The law abolishing the old Commission and the law creating the new Commission both became effective June 25, 1953. (R. 56.) McLaughlin's pretended Amended Regulation No. 10 is dated June 29, 1953. Suppose an appeal to the Commission had been attempted. What would have been the result? It would have been this: the Commission would say: "We know not McLaughlin. We never authorized him to promulgate regulations. It is not a regulation or determination of the Commission, as the law requires. It is a nullity. We have no concern with it. We are not authorized to hear any appeal. This is an invalid act, committed by an unauthorized person, and it is a matter entirely for the courts to decide."

Second: the law made no provision for any such appeals. Let us see what the law does say about appeals. In the first place, the law, Section 7, Chapter 99, SLA 1953, imposes the duty upon the Commission, and not anyone else, of determining seasonality. In fact, it says: "No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission." There is no doubt that if the Commission has made a determination, it may then designate to some executive officer

the duty of constructing a regulation in accordance with the determination of the Commission, but that is not what was done. Now, as to appeals, we find that provision in the fourth paragraph of subdivision (2) of Section 7. We find this language:

“Within fifteen days after the date of mailing or handing such written declaration, the employer or other interested party *may* appeal from such determination.” (Emphasis ours.)

This section regarding appeal refers throughout to the *determination* of the Commission, and that is the determination the Commission is required to make under the provisions of subdivision (c)(1) of Section 7.

It is plain, therefore, that the appeal mentioned in Section 7 is an appeal to correct an error in the determination of the Commission or at most, to correct, modify or set aside a regulation erroneously promulgated and claimed to be based on the determination of the Commission. Surely it does not refer to an appeal in the case of one who attempts to promulgate a regulation without authority, and who has absolutely no power to make any determination.

It will be noted that the provisions for appeal are that an employer or other interested party *may* appeal from such determination. It would, therefore, appear to be optional and even if what was involved here had been a regulation of the Commission itself, we do not think the law would require any appeal before seeking the aid of a Court, except

at the option of the employer or other party interested.

We will concede that if the Commission had made a determination as required by Section 7, and had then appointed McLaughlin Director and then delegated to him the authority to promulgate a regulation in accordance with the determination of the Commission and he had made errors or exceeded the bounds of the determination of the Commission, then we would have the right of appeal, but not even then would we have to appeal if time were an element.

The authorities cited by appellant are not in point. Typical is the case of *Myer v. Bethlehem Ship Building Co.*, 303 U.S. 41, where plaintiff sought to enjoin a hearing by the National Labor Relations Board. There was involved in that case no action amounting to the exercise of quasi-judicial powers of one without authority. What the plaintiff in that case was attempting to do was enjoin the National Labor Relations Board from holding a hearing. The Court held that certain administrative steps were provided by law and that these must be followed, and that the law, having given the Board no power to enforce its orders, required a hearing in Court ultimately so that the plaintiff's rights were fully protected.

We think the result in that case would have been quite different had some unauthorized board or executive officer without power attempted to hold a hearing and make a determination affecting plaintiff's rights which would result in irreparable injury. All

the cases cited by appellant in his brief may be distinguished for the same reason.

Here we do not seek to enjoin any step of the Commission, but the enforcement of a regulation made by one without authority, clearly contrary to law and void on its face.

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**3. WOULD PLAINTIFF AND INTERVENOR AND THOSE WHOM THEY REPRESENT BE IRREPARABLY INJURED BY THE ENFORCEMENT OF PRETENDED AMENDED REGULATION NO. 10.**

The theory of the Employment Security law is, and its purpose always should be, to set up a fund to pay persons who are unemployed through no fault of their own. For that purpose the employer pays 3% into the fund. A small part of this goes for administration purposes, and the remainder for benefits. If plaintiff is obliged to pay into this fund any amount of money which, under some regulation such as the one in question, may not be credited to plaintiff for the purpose for which it was paid in, plaintiff has been irreparably injured. The Court knows that the law sets up a certain system of experience rating credits and each employer is rated according to his experience in the matter of employment. If his payroll is steady and does not fluctuate, he is in a higher class than if he has a fluctuating payroll. In the administration of the law an attempt is, or should be, made to build up a surplus, and when it goes beyond a certain point, employers receive credits



according to their experience rating. That is the theory of the law.

The Employment Security Fund is insurance. The employer pays his contributions of 3%, which are in the nature of insurance premiums. He insures the employment of his employees to a certain extent, in accordance with the provisions of the law, by the payment of these premiums. If he does not get the protection, that is to say the insurance which he has purchased for his employees on an equal basis with other employers, he is irreparably injured. The amount of the premium, namely 3%, is fixed for all employers and all are required to pay that amount into the fund, so that each employer has an interest in the fund and in its administration and in the disbursements of benefits, for if the fund is not administered according to law, if it is wasted and if the surplus is exhausted, not only is there no hope of getting experience rating credits, but the employers are faced with paying much heavier contributions in the nature of insurance premiums.

We wish to call the Court's attention to the fact that plaintiff brought this action not only on its own behalf but on behalf of the Alaska Salmon Industry, Inc., which is an organization composed of various packers of canned salmon in the Territory, but it also brought it on behalf of "all those engaged in the packing of canned salmon in Alaska". (R. 3-4.) The plaintiff is an employer, one of the employers required to pay the contributions or insurance premiums. The intervenor, Clara Wilson, is an em-

ployee and her complaint in intervention adopts and realleges all the allegations of plaintiff's complaint and makes them a part of her complaint by reference thereto. (R. 17.) Therefore, the intervenor also brings the action on behalf of all employers and all employees in the canned salmon industry, so that an injunction should be granted if any of them are irreparably injured and have no plain, speedy and adequate remedy, save through a court of equity.

The definition of "irreparable injury" is quite simple, and Courts have been concerned with it so often that it seems unnecessary to cite a large number of authorities. It is generally understood to mean that equity jurisdiction attaches whenever an award of damages in a court of law would be inadequate to redress an injury suffered.

It is a flexible doctrine which hinges on the facts of each case. *Fox v. Krug*, 70 Fed. Supp. 721.

Bouvier's Law Dictionary contains the following definition:

"Irreparable Injury. As a ground for injunction, it is that which cannot be repaired, retrieved, put back again, atoned for. 28 Fla. 387; it does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great; 142 Ill. 104. See Injunction. Injury of such nature that the party wronged cannot be adequately compensated in damages, or when the damages which may result cannot be measured by any certain pecuniary standard. Anderson; 39 Wis. 164. All that is meant is, that the injury would be a

grievous one, or at least a material one, and not adequately reparable in damages. The term does not mean that there must be no physical possibility of repairing the injury. Id.; 76 Va. 306. The word 'Irreparable' is unhappily chosen to express the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages estimable only by conjecture and not by an accurate standard. Id.; 24 Pa. 160. In the sense in which used in conferring jurisdiction upon courts of equity, does not necessarily mean that the injury complained of is incapable of being measured by a pecuniary standard. Id.; 58 Mich. 485. Literally, anything is irreparable injury which cannot be restored in specie. In law nothing is irreparable which can be fully compensated in damages. To entitle a party to an injunction, he must show that the injury complained of is irreparable because the law affords no adequate remedy. Id.; 35 Pitts. Leg. J. 406."

Appellant says that the harms feared by the appellees are merely speculative and conjectural. It is the element of speculation which makes an injunction especially applicable to a case of this nature.

In the case of *Columbia College of Music v. Tunberg*, 116 P. 280, an injunction was issued against a music teacher to enforce a contractual agreement not to teach music in competition with the college. The objection was raised that plaintiff had not shown the loss of any pupils on account of defendant's competition in teaching music. In disposing of that contention, the Supreme Court of Washington said:

“His continued effort may succeed. To prevent wrong is the peculiar province of equity. His conduct has been such, and promises to be of such character, that damages may result. If so, they would be irreparable in the sense that they could be estimated only by conjecture and not by any accurate standard.” 116 P. 280, 282.

See, also:

*Crouch v. Central Labor Council*, 293 P. 729 (Ore. 1930);

*Bethel Methodist Episcopal Church v. Greenville*, 45 S.E. 2d 841 (S. Car. 1947);

*Kirk v. Watson*, 4 S.E. 2d 13 (S. Car. 1939).

In the last mentioned case, an injunction was sought to restrain the County Treasurer from diverting tax monies raised for the purpose of paying interest on bonds. The Court found an irreparable injury in that the value of the bonds held by the plaintiff was being diminished by the diversion of these funds to improper uses. On this point, the Court said:

“As pointed out by appellant, whether a wrong is irreparable in the sense that equity may intervene and whether there is an adequate remedy at law for a wrong, are questions that are not decided by narrow and artificial rules. The courts proceed realistically, if the threatened wrong involves actual damage; the mere uncertainty of fixing the measure of such damage to the injured party may itself be sufficient to justify the exercise of equitable jurisdiction; and if the available legal remedy in a given case reduces itself to a matter of words rather than

to a matter of efficacy because of its impracticability or because the threatened acts may continue during the progress of an action at law, or because successive actions at law would be necessary to protect plaintiff's rights, equity will hold that the existence of the legal remedy is not an obstacle to the exertion of the equitable power."

The law becomes a part of every contract of hire. The question of whether employees in the same industry are covered by unemployment insurance to an equal extent affects all wage negotiations. Under Amended Regulation No. 10 we have some local employees who work only during the actual canning season, that is, while the fish are being put in the cans, and whose unemployment compensation, if any, is restricted to that brief period during the following year, while others who work alongside these same employees in the canneries in other work in connection with canning, are employed for three or four months, and, therefore, they become non-seasonal for this reason: subsection (5) of Section 7, Chapter 99, SLA 1953, reads as follows:

"Seasonal Worker. 'Seasonal worker' means an individual who has base period wage credits of which at least eighty per centum have been ~~carried~~  
EARNED in seasonal employment."

It will be seen from a reading of this section that the seasonal workers are those who earn at least eighty per cent of their wages during the season fixed by the Commission. If they earn twenty percent outside that season, they become non-seasonal. Therefore,

when the season is fixed as it was attempted to be by Amended Regulation No. 10, to correspond with the actual fishing season permitted by the Fish & Wildlife Service in the various districts, those employees who must work in and about the cannery in preparations weeks before the actual fishing season, and must work for some time thereafter, are therefore non-seasonal, because more than twenty percent of their entire wages is earned outside the season as arbitrarily fixed by the pretended regulation. (See testimony of Peter F. Gilmore, R. 88-91 and 100-101.)

The Record shows that the seasons attempted to be fixed in purported Amended Regulation No. 10 correspond with the open fishing seasons as fixed by the U. S. Fish & Wildlife Service, but as a matter of fact, the Fish & Wildlife Service is given the power under the law and exercises the power each year to change the season of actual fishing from day to day, if necessary, according to the state of the fish run, and it is changed and frequently completely closed in certain areas before the date previously fixed, and sometimes extended.

Therefore, we see that the Filipinos, mechanics and others working in the cannery and working side by side with the native women and others residents for the same purpose, are in a non-seasonal class, while the natives and residents are classified as seasonal because of the eighty-twenty rule.

Plaintiff and others whom it represents are paying premiums or contributions on all employees alike, and the employees in one class are fully covered and

in the other class only partially so. Plaintiff is further injured by the fact that it contributes the same amount to the fund as all other employers outside the salmon canning industry, and that their contributions fully cover their employees the year around, while plaintiff's contributions cover only a part of its employees and the remainder is used to pay employees of others, whose employment is also seasonal, but who have been classified as non-seasonal. (Findings 7 and 12, R. 58, 60.)

Appellant contends that plaintiff and others could not be irreparably injured and would not have the right to maintain this suit, and he cites certain cases, typical of which are the following:

*Sheldon v. Griffin*, 174 F. 2d 382 (9th Circuit);

*Hess v. Mullaney*, 213 F. 2d 635 (9th Circuit);

*Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571.

However, these cases are readily distinguishable from the case at bar. In the case of *Sheldon v. Griffin*, supra, the plaintiff had brought a suit to declare an act of the Legislature invalid. This act was an amendment to the Unemployment Compensation Law. He alleged in his complaint that he was a citizen and taxpayer and nothing more. He was not classified as either an employer or an employee, and he neither contributed to the fund nor received benefits from it. The Court held that he did not have a sufficient interest in the fund to complain of the law.

In the case of *Hess v. Mullaney*, supra, this Court held that a taxpayer who suffered no harm from the lack of a general Territorial Board of Equalization

was in no position to attack the validity of a property tax.

In the case of *Jeffrey Mfg. Co. v. Blagg*, supra, the Court held that an employer cannot object to a discrimination which affected employees only. These propositions of law are elementary, but are not in point here.

This is not a case attacking the validity of a tax paid by all taxpayers alike. It is not a suit to enjoin the imposition of a tax on all alike, but it is a contribution to a specially ear-marked fund. This is an insurance fund set up by employers for a certain purpose, with far-reaching effects. The disposition of the fund affects the rate of contributions, because of the experience rating provisions which are in the Alaska law, and in the law of practically every State in the Union. It affects wage contracts and seriously affects them if one class of employees is covered and another is not covered. The depletion of the fund is of paramount interest to all contributors, because when it reaches a certain point, there is no salvation except to make larger contributions, and the Record abundantly shows that was what was facing the plaintiff and others similarly situated in this case. The plaintiff has a sufficient interest in the disposition of the fund to restrain unlawful and improper uses to which the fund is put. We think this case is governed by the decision of the U. S. Supreme Court in the case of *U. S. v. Butler*, 297 U. S. 1. In that case, it was held that one who pays a tax levied for a specific purpose, as distinguished from a tax to obtain general revenue,



has standing to question the validity of the purpose for which the money is to be expended. We can find no cases which reason otherwise. In fact, this case is much stronger than the *Butler* case, because the contributions involved are not what is commonly known as a tax, but are contributions or premiums to an insurance fund. We think in this case, as one who is obliged under the law to support a special system of governmental regulation, as we have here an insurance system—a system designed to benefit both employer and employee—the appellee is certainly vested with a sufficient interest to call into question the conduct of officials charged with administering the fund. To hold otherwise is to place appellee and others interested at the mercy of capricious waste and misapplication of the monies which are exacted under the law, only because they are to be used for prescribed and limited purposes.

Plaintiff further complained that the regulation is discriminatory, because other employers, notably in the construction industry, whose work is also seasonal, are classified as non-seasonal and that these non-seasonal workers enjoy benefits at all seasons of the year when out of work and are rapidly depleting the surplus fund which plaintiff has assisted in building up through the years. The lower Court found from the evidence that the fund had decreased from \$11,264,484.74 in 1948 to \$4,380,000.00 on April 24, 1954, although the total taxable payroll in 1953 was the highest in the Territory's history. (Findings 15-16, R. 61-62.)

Appellant has contended throughout this case and now contends that the plaintiff cannot be injured, for if benefit Regulation No. 10 is invalid, this will result in declaring all employees in the salmon canning industry to be non-seasonal, along with all other employees in every other industry and calling in Alaska, and in paying more money out of the fund for that reason, and that this would further deplete the fund and injure and not benefit plaintiff. However, the plaintiff has been paying into the fund its insurance premiums on its employees for years. If all this money is being paid out to non-seasonal workers and the fund is approaching bankruptcy, plaintiff has the right to see that before the fund is completely exhausted its employees get their just share on the same basis as all other seasonal workers who have been drawing so heavily on the surplus because classified as non-seasonal. The plaintiff has paid the insurance premiums into the fund for years for the purpose of giving its employees certain unemployment insurance benefits, and we do not think it should be required to sit idly by and see all of these contributions paid out to others, leaving them with no protection for the future. The trial Court disposed of this contention in its opinion in the following language:

“The defendant argues that, if the regulation is invalidated, the unemployment compensation fund will be more quickly exhausted because of the necessity of paying benefits to cannery workers on a par with nonseasonal workers. It requires no perspicacity to see that if one entitled to a share of a common fund foregoes his right there-

to the process of depletion will be retarded. Aside from the fact that such an argument can have no appeal to a court of equity, it is wholly irrelevant. The paramount objective of the court is justice. The depletion of the fund is of no concern to the court except as it may shed light upon the contentions of the parties. It may not be amiss, however, to point out that, apparently, the defendant is concerned with depletion only if the process is accelerated by according the same rights to the plaintiff and the intervenor as all others engaged in seasonal activities receive."

We have been discussing the position and the rights of the plaintiff, Fidalgo Island Packing Company. However, there is more involved in the case than the rights of plaintiff. We think from what we have said and from the decisions cited, the plaintiff had the right to maintain this action and that it was in danger of being irreparably injured by the threatened enforcement of benefit Regulation No. 10, but plaintiff brought this suit on behalf of itself, other employers, and also on behalf of

"all those engaged in the packing of canned salmon in Alaska." (R. 3-4.)

That is the allegation of plaintiff's complaint, and again in paragraph 8 it is alleged that defendant is

"threatening to enforce Regulation No. 10 against the plaintiff and apply its provisions to the plaintiff, its employees and workers, and all other persons and corporations engaged in canning salmon in Alaska, and all their workers and employees, and the enforcement thereof will result

in a great irreparable harm and damage to the plaintiff and all others similarly situated and to all their employees and workers, and cause plaintiff and all others similarly situated and all those engaged in the salmon canning industry to change and adjust their seasons of employment, with consequent increased unnecessary expense, the exact amount of which cannot be determined but which varies from time to time in each area affected and with each separate employer and the employees thereof.”

Plaintiff made no objection to this pleading by motion or otherwise.

It will be seen, therefore, that throughout the complaint the plaintiff contended that it had brought this suit on behalf of itself, other cannery owners and operators, and all employees.

This matter of discrimination was called to the attention of Mr. McLaughlin, the author of the regulation and the one who was threatening to enforce it, while he was on the witness stand, and his testimony shows the following:

“Q. \* \* \* Now, let's take some of these natives—Indian women, who keep house, and young children that work in the canneries in the summertime and don't have any employment anywhere else during the year. How are they benefited by this regulation? Isn't that where your discrimination comes in?

“A. I wouldn't call it discrimination, Mr. Faulkner. It is their custom to work only during that period. They are actually the seasonal people that this regulation pertains to.”

Mrs. Wilson, the intervenor, is a cannery employee, and she brought her action on behalf of all those engaged in the packing of canned salmon in Alaska, because she realleged all the allegations of plaintiff's complaint. She was an employee and alleged that the seasons set in the pretended Regulation No. 10 were not the true or actual salmon canning seasons in the Juneau area. (R. 16.) Her complaint in intervention (R. 16) and the regulation itself (R. 10) extend the season only to October 3, 1953, whereas she was employed until October 10, 1953. (R. 16.) It is true that during the benefit year and after the canning season was over she was obliged to secure other employment in a laundry and, therefore, took herself out of the seasonal class, but her complaint and the regulation show that the seasons fixed in the regulation were not the actual canning seasons, and for the reason hereinabove stated, this is true in other districts, for these seasons fluctuate from time to time with the orders of the Fish & Wildlife Service. Therefore, Mrs. Wilson's complaint embraces all employees in the salmon canning industry within the areas affected by the regulation.

Plaintiff's complaint (R. 13) alleges

"That no other seasonal employers in Alaska have been classified as seasonal, and plaintiff has been discriminated against by that fact."

This is a clear discrimination and an injury to plaintiff and one which is irreparable and can never be repaired. In fact, great and irreparable harm has already been done to plaintiff. It was not only

threatened, but it had actually happened before the trial of the case.

The Record shows, and the Court found, that the construction industry in most of the Territory is seasonal. Plaintiff introduced plaintiff's Exhibit No. 2, which is the annual report of the Employment Security Commission for the year 1953. On Table IX there is set up a record showing the covered employment in Alaska by major industry groups for the fiscal year 1953, beginning with July, 1952, and ending with June, 1953. This table itself shows the nature of the construction industry. It also shows the record of salmon canning. The highest employment in salmon packing was in July, 1952, and it was 13,680. The lowest employment was in January, with 624. In the construction industry the employment was higher. It was 15,709 in July, and this was reduced to 3,818 in February, and 3,948 in January.

The construction industry is largely in the business of building roads, bridges, airfields, buildings, etc.; and it is highly seasonal in all areas except Southeastern Alaska. The Court will note that the highest employment in this industry is from June to October. From the very nature of the industry itself and the climatic conditions in Alaska, it is a matter of common knowledge that this industry in the Interior and Western Alaska is one which cannot be operated during the extreme weather of the winter. You cannot pour concrete or construct roads or excavate or build bridges during periods of extreme cold, ranging from ten or twelve degrees below zero to fifty below, with

deep snow conditions in some places during the winter months.

The Court in its written opinion said:

“\* \* \* it would take judicial notice of the fact that outside construction work in the Territory, except in Ketchikan and vicinity, is limited by weather to the period from May to October, and is, therefore, seasonal in fact.” (R. 44-45.)

Appellant complains of this and seems to feel that the Court had no right to take judicial notice of this fact, and he recites three material requisites that must be met in order to authorize judicial notice. These are that the matter must be one of common and general knowledge; it must be well and authoritatively settled and not doubtful and uncertain; and it must be known to be within the judicial limits of the Court.

I think the Court's action in this respect could be based upon all these three factors, for they were certainly present. It is certainly a matter of common and general knowledge everywhere that you cannot construct bridges, excavate ground, pour concrete and erect buildings in Western and Interior Alaska during the winter months. There is nothing doubtful or uncertain about that. It is within the limits of the jurisdiction of the Court. It is a matter of such common and general knowledge that it would be almost an insult to the intelligence of any person living in Alaska to urge otherwise, and this is especially so of Judge Folta, who holds court more than half the time in the Anchorage area.

But whether the Court took judicial notice of this fact or not is beside the point, for the Record bears out the fact of the seasonality of the construction industry, or at least a large portion of it, and most of that portion outside the Ketchikan area, where a very extensive construction operation was actually carried on during the winter months here under discussion, so that it is safe to say a large part of those workers who were shown by Table IX to have been employed during the winter were actually employed in the Ketchikan area.

We think even this Court would be entitled to take judicial notice of this fact from simply reading the newspapers and weather reports.

Counsel has inserted in the Record, pp. 224-263, a long statement made by Larry Moore, Manager of the Alaska Chapter of the Associated General Contractors. This statement was read at a public hearing of the Employment Security Commission of Alaska on October 27 and 28, 1953.

Mr. Moore's employers, the Associated General Contractors, are the ones who are responsible for the depletion of the Alaska fund, by reason of the fact that all employees of the contractors in the construction industry have been treated as non-seasonal and draw benefits the year around when out of employment.

We think Mr. Moore's remarks are of very little value to the Court, for it is not what any one person said one way or the other at a public hearing with



which we are concerned, but what the Commission and the executive officers did, and with what result.

Counsel did not insert in the Record, and he did not introduce in evidence, any of the many statements made in opposition to Mr. Moore at this public hearing. It will be observed that Mr. Moore was desperately urging that his employers be continued as non-seasonal despite the express mandate of Section 7, Chapter 99 of the SLA 1953. It is the employees of these employers who come to Alaska by the thousands during the summer months and then return to their homes in forty-one States of the Union and draw large sums in benefits from the Alaska fund. (See Table XIV, plaintiff's Exhibit 2.) This table will show the large payments which went out from the Alaska fund in 1952 and 1953 to these very seasonal workers who had been declared non-seasonal by the defendant. The payments range from \$860,199 in the State of Washington to \$2,492 in the State of Georgia, with residents of such states as Minnesota drawing as much as \$129,289. Even the State of Idaho came in for something over \$37,000, and Wisconsin for nearly \$25,000.

This is a class action, and it is brought under Rule No. 23 of the Federal Rules of Civil Procedure. The plaintiff and others similarly situated, and its and their employees, and all those employees represented by intervenor, had certainly a common interest in this fund, and we think it is governed by the case of *Culver v. Bell & Loffland*, 146 F. 2d 29 (U. S. Court of Appeals, 9th Circuit, 1945.)

Before closing, we wish to point out certain features about the appendices in appellant's brief. In Appendix B, page iv, he inserts Section 55-5-2 ACLA 1949, but this section was repealed by Chapter 99 of the SLA 1953. Then he sets up Section 51-5-7 ACLA 1949, referring to appeals under the old law, but the reference set up in this appendix refers to appeals in cases of claims for benefits.

In Appendix C, page vi, he sets up a portion of Chapter 4, SLA 1937, Extraordinary Session, which deals with seasonal employment. However, this was all changed by Chapter 99, SLA 1953. Then, in Appendix D, page vii, he sets up a portion of Chapter 1 of the SLA 1939, referring to seasonal industry. Again this was changed by Chapter 99, SLA 1953. Then, in Appendix E on page viii, he sets up a copy of Chapter 82, SLA 1953, but immediately following, and without any separation therefrom, he sets up Section 51-5-10 ACLA 1949. This continues on to pp. ix and x. This material is no part of Chapter 82 and it was all repealed by Chapter 99, SLA 1953.

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### CONCLUSION.

From the foregoing, we submit:

1. That the pretended Amended Regulation No. 10 of the defendant is invalid and void.
2. That the action was properly brought in the District Court and no other steps were required.

3. That the plaintiff, intervenor and all others whom they represent, both employers and employees, have been irreparably injured.

We respectfully submit that the judgment of the District Court should be affirmed.

Dated, Juneau, Alaska,

March 7, 1955.

FAULKNER, BANFIELD & BOOCHEVER,  
H. L. FAULKNER,

*Attorneys for Appellee,  
and Intervenor.*

**(Appendices A, B and C Follow.)**



## **Appendices.**



## **Appendix A**

---

### **CHAPTER 82, SESSION LAWS OF ALASKA, 1953**

#### **AN ACT**

(H. B. 128)

To repeal Subsection (a), paragraphs (1), (2) and (3), and Subsections (b) and (c) of Section 51-5-10, Alaska Compiled Laws Annotated 1949, as amended by Chapter 53, Session Laws of Alaska, 1949.

**BE IT ENACTED BY THE LEGISLATURE OF THE  
TERRITORY OF ALASKA :**

Section 1. That Subsection (a), paragraphs (1), (2) and (3), and Subsections (b) and (c) of Section 51-5-10, Alaska Compiled Laws Annotated 1949, as amended by Chapter 53, Session Laws of Alaska, 1949, be and it is hereby repealed.

## Appendix B

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### CHAPTER 83, SESSION LAWS OF ALASKA, 1953

#### AN ACT

(H. B. 129)

To create an Employment Security Commission of Alaska.

BE IT ENACTED BY THE LEGISLATURE OF THE  
TERRITORY OF ALASKA:

Section 1. There is hereby created a commission to be known as the Employment Security Commission of Alaska. The Commission shall consist of four members, who shall be appointed by the Governor, by and with the consent of the legislature, in joint session of both houses, as soon as possible after passage and approval of this Act. Members of the Commission shall be residents of the Territory of Alaska and citizens of the United States, over the age of twenty-one years. Not more than two members of the Commission shall be of the same Political Party. Two members shall be representative of industry or management and two shall be representative of labor. Each member shall hold office for a term of six years, except that:

(1) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of that term; and if a vacancy occurs at a time when the legislature is not in session, through death, resignation, removal or disqualifica-



tion, under this Act, a new member shall be appointed by the Governor to fill the vacancy who shall have the qualifications herein prescribed and who shall hold office for the remainder of the term for which his predecessor was appointed; and

(2) The terms of office of the members first taking office after the date of the enactment of this Act shall begin on the date of their appointment and shall expire, one on February 1, 1955, one on February 1, 1957, one on February 1, 1959 and one on February 1, 1961. The members of the Commission shall be Territorial officers, and before entering upon the discharge of their duties, shall take such oaths of office as are prescribed for Territorial officers. The Governor may, at any time, after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance in office, or commission of a crime.

Upon the expiration of the term of a member, the Governor shall submit the name of a successor for confirmation by the legislature then in session; if the Governor does not submit such name, the incumbent shall continue to hold office and to perform the duties thereof until his successor shall be appointed and confirmed by the legislature, as in this section provided, and no recess or interim appointments shall be made in such cases.

(3) The Commission shall appoint a director who shall be the chief executive of the Commission, whose compensation shall be Eight Thousand Five Hundred

Dollars (\$8,500.00) per annum, payable in equal monthly installments; he shall be appointed for a term of four years and may be removed at the pleasure of the Commission. No person shall be appointed Director unless he is a citizen of the United States, a resident of this Territory and has been such resident at least five years immediately preceding his appointment. The Director shall be subject to the supervision and direction of the Commission and shall perform such duties as the Commission may assign to him.

(b) One of the members of the Commission so appointed shall be chosen by all members as Chairman of the Commission. Members of the Commission shall be reimbursed for actual travel expenses and shall receive a per diem allowance for each day that they are away from home in connection with their official duties in carrying out the purpose of this Act. The reimbursement of all Commissioners shall be from the Employment Security Commission administration fund.

(c) Any three Commissioners shall constitute a quorum, and no vacancy shall impair the rights of the remaining Commissioners to exercise all the powers of the Commission.

## Appendix C

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### SECTION 7, CHAPTER 99, SESSION LAWS OF ALASKA, 1953

Section 7. That Sec. 51-5-2 (c) ACLA 1949 is hereby repealed and a new section in lieu thereof is hereof enacted to read as follows:

(c) (1) Seasonal Employer. As used in this section the term "seasonal employer" means an employer or operating unit of an employer which because of the seasonal nature of its operations, reduces its employment to such an extent that its monthly payroll for each of three consecutive months in each of two consecutive calendar or operating years immediately preceding the year for which the determination is made, is less than one-half the average monthly payroll for the three consecutive months of highest payroll in the same calendar or operating years. No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission. A successor in interest of a seasonal employer or operating unit shall be deemed seasonal upon the same basis as the predecessor unless determined otherwise by the Commission.

(2) Seasonal Period and Duration of Determination. In establishing a seasonal period as contemplated herein, the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged. When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the sea-

sonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation.

Employers affected by such regulation shall report on forms provided by the Commission the wages payable to individuals in their employ during the inclusive dates of the seasonal period set by the Commission, as distinguished from wages payable for employment before or after such seasonal period.

Prior to June thirtieth each year, a written determination declaring the employer to be seasonal and specifying the period of seasonal operation shall be forwarded to the employer involved. Notice of the determined season shall be forwarded to any representative of individuals in the employment of such employer and of whom the Commission has knowledge. Within fifteen days after the date of mailing or handing such written declaration, the employer or other interested party may appeal from such determination. An appeal shall be made to the Commission stating therein why the determination is appealed. After affording the parties a reasonable opportunity to submit briefs with respect to the determination appealed from, the Commission may affirm, modify, or set aside such determination, and such action of the Commission shall be deemed conclusive unless further appeal is initiated as provided in Section 51-5-7 (h) herein.

(3) Seasonal Employment Defined. "Seasonal employment" means all employment for a seasonal em-

ployer or operating unit within the season determined by the Commission as its operating season. All wages payable by a seasonal employer within such operating season shall be deemed seasonal wages.

(4) **Operating Unit.** For the purposes of this Act relating to seasonal employment, an "operating unit" is any unit of an employer's business which frequently is conducted as a separate and independent operation.

(5) **Seasonal Worker.** "Seasonal worker" means an individual who has base period wage credits of which at least eighty per centum have been earned in seasonal employment.

(6) **Benefit Payments to Seasonal Workers.** When the Commission has designated the operations of an employer or an operating unit as seasonal, then benefits shall be payable to seasonal workers employed thereby only on account of unemployment occurring during the regular period of such seasonal employment as designated in Section 51-5-2 (c) (2).



No. 14,505

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

A. B. PHILLIPS, Executive Director,  
Employment Security Commission  
of Alaska,

*Appellant,*

vs.

FIDALGO ISLAND PACKING Co.,

*Appellee,*

CLARA WILSON,

*Intervenor.*

Upon Appeal from the District Court for the  
District of Alaska, Fourth Division.

REPLY BRIEF FOR APPELLANT.

---

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FILED

APR 28 1955

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---

**Upon Appeal from the District Court for the  
District of Alaska, Fourth Division.**

**REPLY BRIEF FOR APPELLANT.**

---

This brief has been prepared as a reply to arguments in appellee's brief, which, if left unanswered, may leave the Court with an incomplete picture of the true underlying issues involved in this litigation.

---

**PRELIMINARY CONSIDERATIONS.**

Above all else, the Alaska Employment Security Commission wishes to impress upon the Court that

there are only two fundamental issues involved herein:

(1) The jurisdictional issue of appellee's right to sue in behalf of all seasonal employees in Alaska, and

(2) the effect and validity of the seasonality regulation No. 10 as it pertains to the appellee-employer, and the nonseasonal intervenor-employee.

Any digressions from these issues should be carefully noted, as, for example, the somewhat strained and repeated effort of the appellee to establish a cause and effect relationship between the promulgation of regulation No. 10 and the alarming depletion of the Unemployment Trust Fund.<sup>1</sup>

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### ARGUMENT.

The following questions raised by statements in the appellee's brief should be satisfactorily answered in order that the Court may have a clear perspective of the case:

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<sup>1</sup>The most disturbing and paradoxical element in this law suit is the extremely contradictory position the appellee takes, i.e., its contention that the fund should be preserved, yet urging the Court to set aside a regulation that was and is designed to actually save approximately one-half million dollars for the fund.

## I.

## JURISDICTIONAL QUESTION.

May an employer (appellee) and a nonseasonal employee (intervenor) champion the rights of every seasonal cannery employee in Alaska?

The record discloses that there is not one word of testimony or a single shred of evidence by, or in behalf of, a *seasonal employee* of the canned salmon industry. Nor did the intervenor (a nonseasonal employee) appear in Court to present any evidence, either personally or by deposition or affidavit. The sole true party in interest throughout is the appellee, Fidalgo Island Packing Company, a nonresident salmon-packer employer. It alone produced witnesses and evidence in support of the contention that seasonality regulation No. 10 is void, and therefore a half-million dollars in benefit payments are being illegally withheld from certain *seasonal employees* in Alaska's canned salmon industry.

Appellee bases its alleged right to champion the rights of all Alaskan seasonal cannery employees on the allegation in its complaint that it is bringing this suit in behalf of all salmon packers and their employees. (Pp. 29-30 of appellee's brief.) Appellee further states that, "This is a class action, and it is brought under Rule 23 of the Federal Rules of Civil Procedure . . ." (P. 35 of appellee's brief.)

In its answer, the appellant denied the above allegation, thereby putting the matter of plaintiff's representation of all seasonal cannery employees to proof. (R. 18.) A careful examination of the record

discloses that there is not one scintilla of evidence in support of the allegation put in issue. Therefore, the conclusion is inescapable that the Fidalgo Island Packing Company appears solely on its own behalf.

An examination of Rule 23(a) will demonstrate that appellee cannot represent seasonal employees, either in a "true" or "spurious" class action. Rule 23 states:

"Rule 23. Class Actions.

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is .

- (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
- (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
- (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Moore's *Federal Practice*, 2d Edition, Vol. 3, at p. 3435 defines a true class suit as follows:

"The 'True Class Suit' is one wherein, but for the class action device, the joinder of all inter-

ested persons would be essential. This would be cases where the right sought to be enforced was joint, common or derivative.”

The “spurious” class suit is defined by Judge Clark, a co-author of the Federal Rules, in *California Apparel Creators v. Wieder of California, Inc.* (C.C. A. 2d 1947), 162 F. 2d 893, cert. denied 68 S.Ct. 156:

“So far as these plaintiffs assume to represent others they can do so only by virtue of subd. (3) of Rule 23(a), F.R.C.P., which has been commonly referred to as granting authority for the so-called ‘spurious’ class suit. None of the requirements of subds. (1) and (2) are fulfilled; and the basis of representation is only, as indeed plaintiffs themselves assert, the existence of common questions of law or fact affecting the several rights. But this is merely a device of permissive joinder of plaintiffs, found unnecessary under state procedures and only helpful in the facilitation of the broad disposition of suits within the confines of federal jurisdiction. It does not grant authority to adjudicate finally rights as to non-appearing parties or to confer any additional substantive rights upon the plaintiffs suing. (Citing numerous authorities.) Hence, the rights of the rest of the 4,500 potential plaintiffs are actually not to be settled here, and we cannot give judgment as though they were. We stress this point because at times there appear to be suggestions that the representative character of a suit may aid recovery. Of course where there is a true class suit, as in *Gibbs v. Buck*, supra (Sec. 23.08, n. 7), the consequences are otherwise . . .”

In *Weeks v. Bareco Oil Co.* (C.C.A. 7th, 1951), 125 F. 2d 84, the Court dismissed a spurious class suit on the ground, among others, that there was no showing that any other member of the class favored or even knew of the suit.

Moore, in Vol. 3, 2d Edition, *supra*, at p. 3423, states:

“An action, of course, is not a class suit merely because it is designated as such in the pleadings; whether it is or is not depends upon the attending facts. But the complaint, or other pleading initiating a class action, should allege the existence of necessary facts, i.e., the existence of a class, that the members thereof are so numerous as to make it impracticable to bring them all before the court, that claimant adequately represents the class, etc. . . .”

And at p. 3425, Moore states:

“... In the hybrid class action, the plaintiff, although instituting his action on behalf of himself and others similarly situated, does not ‘in fact’ represent anyone but himself.”

In order for a party to adequately represent a class, he must obviously be a member of the class and his interests must be wholly compatible with and not antagonistic to those whom he would represent. (Moore’s *Federal Practice*, *supra*, p. 3423.)

In the case at bar, the appellee not only is not a member of the employee class but has in fact an antagonistic interest to the employees it claims to represent. The conflict is apparent when it is noted that the appellee-employer states it is the theory



of the law and should be the object of the administration of the Act to create a fund surplus and thereby cause the appellee and other employers to obtain experience rating credits. (P. 18-19 of Appellee's brief.) This results in a divergence of interests, for when seasonal employees secure benefits from the fund they reduce and deplete it, thereby decreasing the possibility of an employer receiving the desired experience rating credits. It is inconceivable that an identity of interests can be found to exist between the appellee-employer and seasonal employees which would authorize the employer to bring suit in behalf of such employees, who are an entirely separate and antagonistic class. It is inescapable that appellee cannot in law represent all or any one of the seasonal cannery employees in Alaska. The same reasoning applies in the case of the intervenor, since she, like the appellee-employer, is not in the seasonal class, and therefore there exists a diversity, rather than a similarity, of interests between the two classes, i.e., seasonal as compared to nonseasonal employees.

In view of these considerations, neither the appellee nor the intervenor may maintain this action. *Jeffrey Manufacturing Co. v. Blagg*, 235 U.S. 571, 576. There the Supreme Court asserted:

“Much of the argument is based upon supposed wrongs to the employee . . . No employee is complaining of this act in this case. The argument based upon discrimination, so far as it affects employees by themselves considered, cannot be decisive; for it is the well-settled rule of this

court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of.”

And in *Griffin v. Sheldon*, 174 F. 2d 382, this Court stated:

“There is nothing in the pleadings or proof to indicate that the plaintiff has a particular right of its own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. To entitle himself to be heard, he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people.” (Citing numerous cases.)

Cf. *Mullaney v. Hess*, 189 F. 2d 417, and  
*Hess v. Mullaney*, 213 F. 2d 635, 640.

Appellee contends that the case of *Culver v. Bell & Loffland*, 146 F. 2d 29 (9th C.C.A., 1945) (p. 35 of appellee's brief), controls herein and is therefore authority for the institution of this action in behalf of all Alaskan nonseasonal employees. In the *Culver* case, *supra*, the complaint alleged that “this action is brought for and in behalf of themselves, and other employees similarly situated.” (146 F. 2d 30.) The lower Court refused to permit amendments that would have added 38 more employees as plaintiffs, on the ground that the claims represented thereby

were not similar to those of the three named plaintiffs. This Court reversed, holding that the act permitting resort to representative suits should be liberally administered by the Courts. It should be carefully noted that in the *Culver* case, supra, the plaintiffs were employees suing in behalf of themselves and other employees of the same class for overtime pay under the Fair Labor Standards Act. In the instant case, the Fidalgo Island Packing Company and a nonseasonal employee are purporting to represent untold numbers of seasonal employees whose basic interests are actually hostile and antagonistic to those of their purported representatives. It is further observed that Rule 23, F.R.C.P., is not even mentioned in the *Culver* case.

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## II.

### IRREPARABLE DAMAGES.

**Have the appellee and intervenor shown irreparable damages or a threat thereof resulting from the enforcement of seasonality regulation No. 10?**

On page 18 of its brief, appellee makes this statement:

“ . . . If plaintiff is obliged to pay into this fund any amount of money which, under some regulation such as the one in question, may not be credited to plaintiff for the purpose for which it was paid in, plaintiff has been irreparably injured . . . ”

In the lower Court the appellee argued that as a result of the rapid depletion of the fund, “. . . the

contributors are bound to suffer injury and the employees are bound to suffer irreparable injury . . .” (P. 15 of appellant’s brief.) The lower Court held that the claim of alleged irreparable damage “. . . is based, in the main, on the progressive elimination of the fund . . .” (R. 52.)

The lower Court made the following findings of fact concerning the manner in which the appellee allegedly has been irreparably injured (R. 60):

“12. That the plaintiff has been irreparably injured and will be further irreparably injured by the application of pretended amended regulation No. 10 to it and others on whose behalf this action is brought, for the reason (1) that the pretended amended Regulation No. 10 does not set up the proper seasons or periods during which they carry on their fishing and canning operations in the Territory and (2) it does not properly define the seasons, which would result actually in making some employees of the plaintiff and others seasonal, and other employees nonseasonal, although all are engaged in the same employment.” (Captioned numbers added.)

Both of these grounds are met on page 18 of appellant’s brief, where it is shown that the canned salmon industry requested that a seasonality regulation be issued based upon the open fishing season prescribed by the Federal Fish and Wildlife Service. Appellee is now most certainly estopped to deny any alleged irreparable injury resulting from the promulgation of the very type of regulation it requested to be issued. Furthermore, it can hardly be disputed

that the Commission is in the better position to "set up the proper seasons or periods during which they carry on their fishing . . ." This points to an additional reason why appellee should be denied judicial review until after the regulatory commission has had an opportunity to consider these type objections. It may very well have been that the Commission would have changed the regulation to appellee's liking had it been given a chance to do so.

In findings of fact No. 18 (R. 63), the lower Court found that the appellee has already been injured and will be further injured if the fund is depleted, for, in such an event, much greater employer contributions will be required to continue payments. First, the most obvious fallacy in this finding is the fact that the regulation which is the subject matter of this suit actually is designed and does preserve the solvency of the fund; and second, there is no evidence showing in what manner the appellee is irreparably injured. In no event shall the contributions be increased by anyone save the legislature, and when and if such contributions are raised or lowered, there are numerous complex factors, of which seasonality constitutes only one narrow element, that enter into a final decision. Appellee has not shown that it has paid one extra cent in contributions between the time of this suit and the present, resulting from the promulgation of seasonality regulation No. 10.

As indicated in the above quote from page 18 of appellee's brief, the argument is presented for the first time that the enforcement of regulation No. 10

causes monies appellee paid into the fund "not be credited to plaintiff for the purpose for which it (the monies) was paid in." This argument is not in accord with reality or the proof submitted by Fidalgo Packing Company in the course of the trial. Regulation No. 10 most certainly does not cause monies to be credited for purposes other than those for which it was paid in. The enforcement of the regulation, in reality, causes monies to be retained in the fund that would otherwise be paid out.

As to the intervenor's status, appellee is forced to admit that due to the fact that she is a nonseasonal employee "she will no longer be injured by the fact that the seasonal regulation as applied to her, is unrealistic." (Quoted on p. 23 of appellant's brief.)

These arguments clearly exemplify the paradoxical position appellee has taken throughout the litigation in its attempt to portray itself as a representative of the employees. There is simply no causal relationship between the employer, the employee, the enforcement of the regulation, the depleted fund, and the irreparable damages the appellee and intervenor are allegedly suffering thereby.

**Does the fact that only certain salmon industry employers were seasonably classified during the four-month period between the effective date of Section 7 of Chapter 99 Session Laws of Alaska 1953 and the date suit was filed (July 30, 1953) constitute hostile and illegal discrimination against said employers?**

Appellee's argument, in a few words, is simply this: Construction industry employers were not sea-

sonally classified; certain salmon industry employers were so classified; therefore, the regulation setting the season periods for salmon packers is void.

The Commission, or Mr. McLaughlin representing it, may very well have intended to consider the status of other industries, including the construction industry, with a view of seasonally classifying several of them. But no such opportunity was given, for suit was filed before the Commission's staff had completed the job of even classifying salmon industry employees. Furthermore, regulation No. 10 has no relation whatever to this issue. If the salmon industry feels that construction industry employers should also be seasonally classified, the proper remedy would appear to be that it apply for a writ of mandamus ordering the Commission to so classify them. The improper approach would seem to be what the salmon industry has pursued herein by filing suit to enjoin a pro-trust fund regulation.



### III.

#### EXHAUSTION OF REMEDIES.

**Is an appeal to the Commission a condition precedent to judicial review?**

Appellee appealed directly to the District Court and thereby failed to utilize two separate administrative channels:

- (1) An appeal from the determination of seasonality; and

(2) an appeal from the promulgation of the regulation which set the seasonal periods.

Appellee gives three reasons why it did not pursue such an administrative appeal:

(1) The regulation is void and made by one wholly without authority. (P. 14 of appellee's brief.)

(2) The law makes no provision for an appeal from the determination of an executive director. Only an appeal from a determination by the "Commission" is provided for. (P. 15 of appellee's brief.)

(3) Even if a "Commission" regulation were involved, the law does not require a prior administrative appeal "except at the option of the employer or of a person interested." (P. 16-17 of appellee's brief.)

Reason No. 1 begs the argument for the validity of the regulation is in issue before this Court. Even if the regulation were invalid, respected authorities hold that such invalidity is no excuse for failing to lodge an administrative appeal. (See authorities on pages 26 and 27 of appellant's original brief.)

Reason No. 2 presupposes that the executive director was not delegated authority to act in the name of the Commission and even if he did act in its name, he exercised an improper or illegal delegation of authority. Section 51-5-1(f) A.C.L.A. 1949 states that the Commission can be "... any person to whom



this Commission may delegate its powers and duties . . .” The evidence shows such a delegation was made. (R. 161, 162.) The regulation was promulgated by the executive director pursuant thereto.

Reason No. 3 is supported by appellee’s interpretation of Section 7 contrary to the plain wording of the statute. When Section 7(c)(2) states that the aggrieved employer or other interested party “may appeal,” it means that an administrative appeal may be lodged, but if such an appeal is not perfected, the aggrieved party is foreclosed from the right of judicial review.

On the face of the placard, which placard constituted the notice of determination herein, is the statement that unless an appeal is taken to the Commission within fifteen days, the seasonal determination shall become final. (Defendant’s Exhibit “B”—R. 32.)

If the law permitted an appeal from an administrative ruling only at the discretion or option of the employer or other persons aggrieved, then the very purpose of a preliminary administrative hearing would be frustrated, for no person would pursue an expensive and time-consuming administrative appeal if he were allowed to go directly into the District Court for a final determination. Appellee’s interpretation does violence to the underlying purpose behind the concept of having administrative bodies assist the Courts by setting forth their opinions, as experts, before the District Court must undertake to become specialists in the particular field involved.

## IV.

## VALIDITY OF THE REGULATION.

**Did the Commission have authority to delegate regulation-making power?**

This point is covered on pages 28 through 30 of appellant's brief. In summation, it can be stated that Section 51-5-1(f) authorizes the Commission to delegate its power and duties, and since such a delegation was made by the Commission to its executive director, the regulation promulgated thereby is valid.

The trial Court stated that the determination of seasonality is one of the most important functions of the Commission, and it is therefore inconceivable that it could delegate such power to its executive director.

Because of the Territory's vast geographical area and the fact that the executive director, with a full-time staff, is in a manifestly better position to at least make the *initial determination* of seasonality, it would seem that the legislature intended to encourage commissions to delegate authority to their executive heads to make initial determinations. Such authority of the particular executive director herein to make initial determinations is clear from the 1938 delegation of authority (R. 161, 162) authorized by Section 51-5-1(f), which retains for the Commission the power at their next meeting to "either approve or disapprove such rules and regulations." Under the circumstances of this case, if the executive director had not issued regulation No. 10 on June 29, 1953, but instead had waited for the first meeting of the

Commission, which was held on August 6, 1953, he would have been derelict in his duty. June 30th was the deadline date in which to issue the seasonality regulation, and failure to do so would have resulted in a half-million dollar loss to the fund.

**Does the regulation conform with the statute?**

Appellee contends that even if the executive director had power to issue regulation No. 10 under the old law, he did not comply with Section 51-5-2(c)(1), which provides for investigations and hearing before a determination is made. (P. 12 of appellee's brief.) This section is inapplicable, since the appellant issued the regulation under authority of Chapter 99 S.L.A. 1953, which statute repealed, among others, Section 51-5-2(c)(1).

Appellee further contends that if the executive director acted under Chapter 99 S.L.A. 1953, then the regulation did not comply with the law, since it places seasonality on an industry basis rather than on an individual employer basis and that no authority could be delegated by a commission not yet in existence. (P. 12 of appellee's brief.)

This contention is answered on pages 42 through 44 of appellant's brief. An examination of the regulation discloses that its sole purpose is to prescribe a seasonal period for previously determined individual employers. The regulation states, in part:

“The Commission accordingly prescribed:

I. Seasonal periods . . . for certain employers . . .

### III. Reporting by seasonal employers:

Employers having been determined by the Commission to be seasonal employers and so notified shall report . . .”

The contention by the appellee that the executive director could not have been delegated any authority until the new board was to meet, several months after the date of the promulgation of regulation No. 10, presupposes that the old commission would be defunct prior to the new commission taking office. Appellee completely disregards the doctrine of simultaneous repeal and re-enactment. As we have shown on pages 31 through 34 of our brief, because of the virtually identical wording of the repealing and the repealed Acts, said doctrine applies. Therefore, until the new board convened, the old board could validly function and its actions have the force and effect of law.

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## V.

### JUDICIAL NOTICE.

Did the District Court err by ruling, in effect, that every employer in the Alaskan construction industry is seasonal in fact?

On page 33 of appellee's brief, this statement is made:

“It is certainly a matter of common and general knowledge everywhere that you cannot construct bridges, excavate ground, pour concrete and erect buildings in Western and Interior Alaska during the winter months.”

But does appellee mention that construction work, among other things, also consists of inside plumbing, electrical wiring, heating, etc., inside newly-constructed buildings? Thousands of men are doing that type of work during the colder months. Typical of this type winter construction is the Eklutna project near Anchorage. The appellant chose to ignore this phase of year-round construction.

The Court, by judicially noticing that the Alaskan construction industry is seasonal (save Ketchikan and vicinity), in effect regards these construction employers, who employ electricians, etc., during the winter months, as being seasonal employers as a matter of law, when, as a matter of fact, they are full-time employers. The lower Court's ruling on this point is erroneous.

Good authority exists for the proposition that (a) judicial notice shall not be taken unless the litigant against whom the judicially noticed matter is to be used is given notice and opportunity to be heard as to the propriety of taking judicial notice and the exact content of the matter to be noticed, and (b) the judge is bound to decline to take such notice if the matter is not clearly indisputable. (See Morgan, *Judicial Notice*, (1944), 57 Harvard Law Review 269; Morgan, *Evidence* (1946), Practice of Law Institute, P. 2; Rules 801-806, *Model Code of Evidence*.) The Court gave no notice or opportunity to the appellant to be heard relative to the propriety of its taking judicial notice that Alaska's construction industry is seasonal. Furthermore, as stated above, the mat-

ter of which it took judicial notice is clearly disputable.

---

### CONCLUSION.

For the reasons shown in appellant's opening brief and in the reply brief, it is respectfully submitted:

1. That appellee and intervenor have no legal right to appear in behalf of all canned salmon employees in Alaska.

2. That the decree of the District Court should be reversed to the extent that it holds that regulation No. 10 is void or that appellee and intervenor were irreparably damaged, regardless of its validity.

3. That, as a matter of law, the appellee and intervenor have not shown that they have been irreparably damaged.

4. That the case should be remanded to the District Court for entry of a decree declaring regulation No. 10 to be valid, dissolving the permanent injunction, and dismissing appellee's complaints.

Respectfully submitted,

J. GERALD WILLIAMS,

Attorney General of Alaska,

EDWARD A. MERDES,

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*Attorneys for Appellant.*

No. 14,505

IN THE

United States Court of Appeals  
For the Ninth Circuit

A. B. PHILLIPS, Executive Director,  
Employment Security Commission  
of Alaska,

*Appellant,*

VS.

FIDALGO ISLAND PACKING CO.,

*Appellee,*

CLARA WILSON,

*Intervenor.*

Appeal from the District Court for the District of Alaska,  
Division Number One.

APPELLANT'S PETITION FOR A REHEARING.

J. GERALD WILLIAMS,

Attorney General of Alaska,

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Assistant Attorney General,

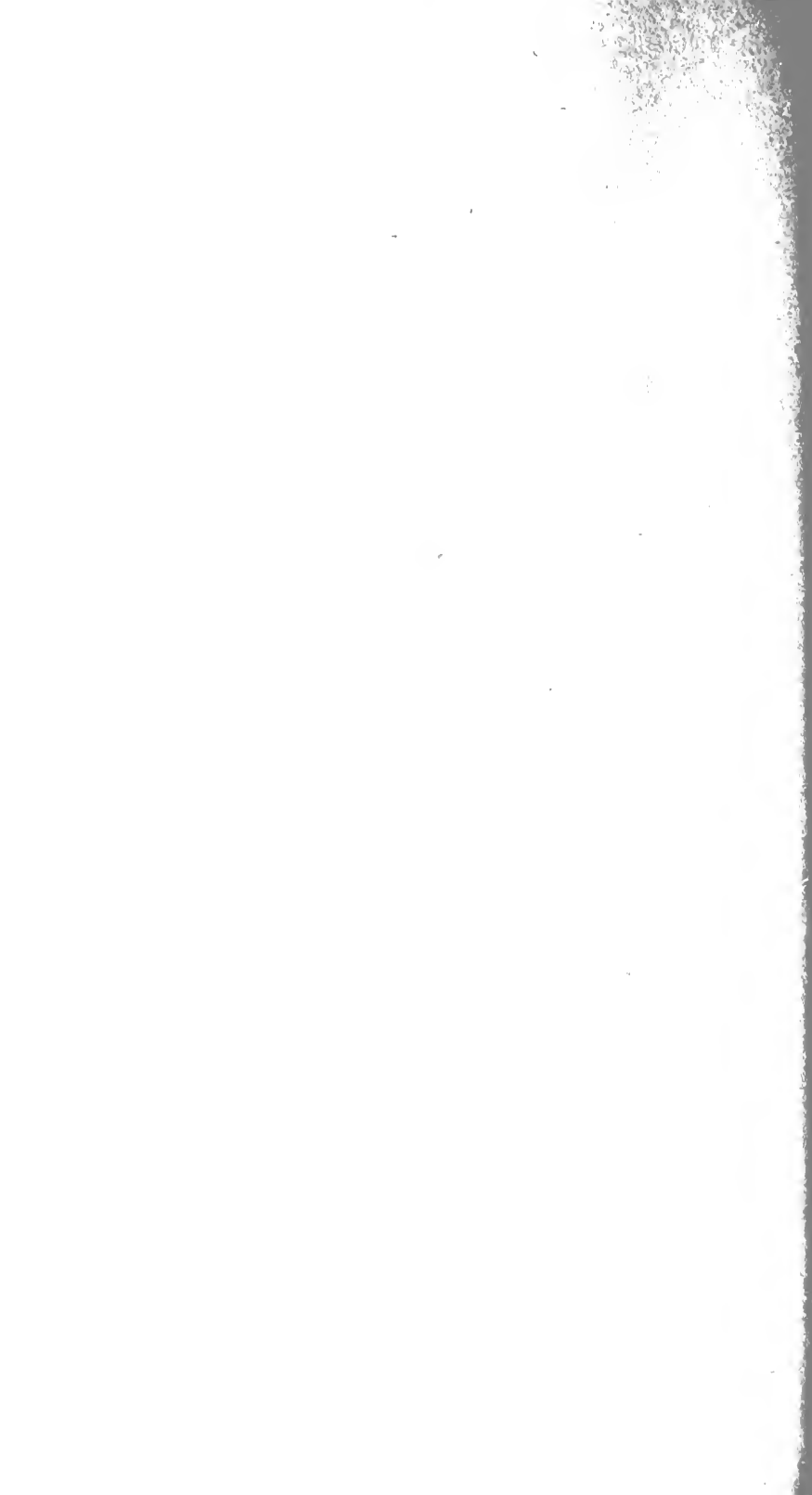
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and Petitioner.*

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Signature: \_\_\_\_\_ Date: \_\_\_\_\_

No. 14,505

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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A. B. PHILLIPS, Executive Director,  
Employment Security Commission  
of Alaska,

*Appellant,*

vs.

FIDALGO ISLAND PACKING CO.,

*Appellee,*

CLARA WILSON,

*Intervenor.*

---

**Appeal from the District Court for the District of Alaska,  
Division Number One.**

**APPELLANT'S PETITION FOR A REHEARING.**

---

*To the Honorable William Healy, James Alger Fee,  
and Richard H. Chambers, Judges of the United  
States Court of Appeals for the Ninth Circuit,  
who constituted the Court in the original hearing:*

The appellant above-named presents this, a petition  
for rehearing in the above-entitled cause and in sup-  
port thereof respectfully submits the following:

The Court's per curiam opinion, in the opening sentence thereof, states that, "this is an extremely confusing case."

Counsel for the appellant lived with this case for over two years and can, therefore, sympathize with the Court's bewilderment in attempting to decide whether the District Court erred in nullifying the administrative regulation involved herein. Apparently, due to the confusing state of the record, this Court reasoned that the most equitable course to follow would be to affirm the District Judge's decision on the theory that a presumption of lawful exercise of authority surrounds the acts of the courts of general jurisdiction "which is not enjoyed by administrative agencies." A careful reading of the opinion seems to indicate that this presumption tipped the scale in favor of the District Court's decision as against the contentions of the administrative agency.

The appellant feels that, in all fairness, the Court should exercise its discretion and grant a rehearing in order that he may have an opportunity to clarify some of the confusion which exists in the Court's mind. During oral argument, only one or two short questions from the bench were directed to counsel for the appellant which were answered to the apparent satisfaction of the Court. From all external indications the Court at no time evidenced confusion over the case. It appears that only subsequent to oral argument and after the Court retired did the case become confusing. Under these circumstances, because of the vital importance of this case to the people of the Ter-

ritory of Alaska as a whole and the possibility that serious mistakes of law and fact made by the District Court will be affirmed due to a confused record, the appellant very earnestly appeals to the Court's sense of fairness and sincerely requests an opportunity for a rehearing in order to re-present the case in as simple and forthright a manner as possible.

It is hoped that if a rehearing is granted, the ultimate decision will be rendered only after a thorough and complete understanding of all facets of the case and will, therefore, afford substantial justice to all concerned. It is most deeply felt that if the Court insists on adhering to its initial decision, in the face of its frank admission that the case is confusing, without affording the appellant the opportunity to clarify this confusion, bad law and a miscarriage of justice will surely result.

Set forth below are the specific grounds for this petition which the appellant feels supports its contention that, owing to a confused record and an inadvertent failure of the Court to consider matters referred to in appellant's brief and alluded to in oral argument, the Court has based its decision upon a wrong principle of law and therefore, serious doubt exists as to its correctness.

## I.

**THE ALASKA EMPLOYMENT SECURITY COMMISSION WAS IN EXISTENCE AT THE TIME REGULATION NO. 10 WAS PROMULGATED.**

In stating in its opinion: (1) that the Employment Security Commission was no longer in existence at the date of the issuance of the regulation, and (2) that the facts found by the Trial Court establish that it is impossible to show that the administrative agency had jurisdiction over the subject matter or persons this Court failed to consider:

*The doctrine of simultaneous repeal and re-enactment set forth under Point 1, Issue II of Appellant's Brief, and*

*The rule that findings of a Trial Court are not conclusive but must have some evidentiary support in the record.*

**The Doctrine of Simultaneous Repeal and Re-Enactment.**

The Doctrine of Simultaneous Repeal and Re-Enactment simply stated, is that where a statute is repealed and all or some of its provisions are at the same time re-enacted, the re-enactment is considered an affirmance of the old law and the provisions of the repealed act continue in force without interruption.<sup>1</sup> *Bear Lake v. Garland et al.*, 164 U.S. 1, 11-12;

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<sup>1</sup>An additional consideration is the fact that the Territory has a general savings statute which reads as follows:

"19-1-1. Effect of repeals or amendments. The repeal or amendment of any statute shall not affect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but



50 Am. Jur., *Statutes*, Section 533; 82 C.J.S. *Statutes*, Section 295; *Commissioner of Internal Revenue v. Emery*, 62 Fed. (2d) 591, 592; *Goublin v. U.S.*, 261 Fed. 5, 10-11, (CCA 9th); *Sutherland on Statutory Construction*, 2nd Edition, Section 238.

This Court in the *Goublin* case, *supra*, at page 11, quotes with approval Professor Sutherland's statement of the rule:

"Where there is an express repeal of an existing statute, and a re-enactment of it at the same time \* \* \* the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time. \* \* \* *Offices are not lost, corporate existence is not ended, inchoate statutory rights are not defeated, a statutory power is not taken away*, \* \* \* by such repeal and re-enactment of the law on which they respectively depend." (Italics supplied.)

The Supreme Court in *Cambell v. California*, 200 U.S. 87, 92 (also cited in the *Goublin* case) stated the same rule in this manner:

"\* \* \* the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption, \* \* \*"

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the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made.

Applying the above stated rule to the case at hand, the conclusion is inescapable that since both the statute which abolished the old Commission (Chapter 82, SLA 1953) and the statute which created the new one (Chapter 83, SLA 1953), are virtually identical in language and form and both were enacted within minutes of one another,<sup>2</sup> the simultaneous rule becomes operative and it must be held that there existed a continuity of Commissions. As Professor Sutherland states when applying the rule:

“Offices are not lost, corporate existence is not ended, \* \* \* statutory power is not taken away, \* \* \*.”

Therefore, it appears that the Trial Court's Finding No. 10 to the effect that no commission was in existence at the time of the promulgation of the Regulation No. 10 is clearly erroneous and not supported by the evidence.

In view of this, the 1938 delegation of authority by the Commission (R. 161 & 162) to its Executive Director, to promulgate rules and regulations<sup>3</sup> constitutes prima facie authority for the issuance of Regulation No. 10 on June 29, 1953. It necessarily follows that the Trial Court's Finding No. 11 to the effect that Mr. McLaughlin had no power or authority to issue said Regulation on June 29, 1953 is also clearly erroneous and not supported by the evidence.

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<sup>2</sup>These statutes should be compared. Both are set out in Appendices “E” and “F”, Appellant's Opening Brief.

<sup>3</sup>This delegation is expressly authorized by Section 51-5-1(f) ACLA 1949. This statute is set forth in Appendix “B”, Appellant's Opening Brief.

Based on the premise that on June 29, 1953 there was a Commission in existence and that McLaughlin exercised a lawful delegation of authority in promulgating Regulation No. 10, it is inescapable that the Appellee and Intervenor have no standing in Court, let alone the right to a permanent injunction, because:

*Neither one has exhausted the administrative remedy provided in Chapter 99, SLA 1953 and*

*The record contains not one scintilla of evidence in support of the Trial Court's finding that the Appellee and Intervenor were irreparably injured by the enforcement of the regulation.*

#### **Exhaustion of Remedies.**

If the Court applies the rule of simultaneous repeal and re-enactment, there is then at least a presumption of validity clothing the director's issuance of the disputed regulation. Since the Appellee and Intervenor did not exhaust their administrative remedies set forth in Chapter 99, SLA 1953, they should both be denied recourse to the courts as expressly stated in Section 51-5-7 (h) and (i) ACLA 1949.<sup>4</sup> (See Issue

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<sup>4</sup>Sec. 51-5-7(h) and (i) ACLA 1949 reads as follows:

"Any decision of the Commission in the absence of an appeal therefrom as herein provided shall become final 30 days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his administrative remedies as provided by this Act. \* \* \*"

"Within thirty days after the decision of the Commission has become final, any party aggrieved thereby may secure judicial review thereof by commencing an action in the United States District Court against the Commission for the review of such decision, in which action any other party to the proceeding

II of Appellant's Opening Brief. Cf. *Phelps Dodge Corporation v. Labor Board*, 313 U.S. 177, 196-197; *Unemployment Compensation Commission of Alaska v. Aragon*, 329 U.S. 143, 153-155.) Further stress is laid upon the rule, developed under Issue II, page 26, of Appellant's Opening Brief, that regardless of an allegation that the agency has no jurisdiction or has acted without authority, a person attacking an administrative order must nevertheless *first* exhaust all administrative remedies. *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, 50, 51; 42 Am. Jur., *Public Administrative Law*, Section 200, P. 201.

#### **Evidence in Support of Trial Court's Findings.**

It is basic that if the record is completely devoid of evidence to support the findings of fact, the findings are "clearly erroneous" and judgment cannot be upheld on appeal. Rule 52 (a) F.R.C.P.; *U.S. v. Gypsum Co.*, 333 U.S. 364, 395; *U.S. v. Oregon State Medical Society*, 343 U.S. 326, 329; *Alaska Freight Lines v. Harry*, 220 Fed. (2d) 272, 275; *Jones Nat. Bank v. Yates*, 240 U.S. 541, 553; 3 Am. Jur., *Appeal and Error*, Section 1656 (i).

The following specific findings of fact made by the Trial Court which findings this Court accepted and based its decision of affirmance upon, have no evidence to support them in the record:

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before the Commission shall be made a defendant. \* \* \* In any judicial proceeding under this Section, the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said Court shall be confined to questions of law. \* \* \*

1. Finding No. 10:

“That at the time purported amended Regulation No. 10 was attempted to be promulgated and declared to be in force, the former Employment Security Commission had been abolished and the new Commission had not yet come into existence and had not met at the time this action was instituted, and they did not meet until August 6, 1953, and there was no Commission in existence to which an appeal could have been taken from purported amended Regulation No. 10.”

In the Trial Court's opinion (R. 42, 48), it emphatically rejected the Appellant's contention that there was no Commission in existence at the time Regulation No. 10 was issued:

“On the other hand, the plaintiff and intervenor contend that the authority delegated to the defendant expired with the abolition of the Commission by Chapter 82, that there was no Commission to appeal to until August 6th, when it met for the first time, \* \* \*.”

After disposing of a preliminary argument submitted by the Appellant, the Court had this to say about the existence of the Commission:

“\* \* \* The remaining contentions are in my opinion untenable for, apparently, *the new members of the Commission had qualified*, and in any event an appeal may be prosecuted although the appellate tribunal is not in session.” (Emphasis added.)

Though the generally accepted rule is that the Court's findings prevail over its opinion the Supreme

Court has ruled that the Appellate Court may look to the opinion as an extrinsic aid in resolving ambiguities. In *American Propeller Co. v. U.S.*, 300 U.S., 475, 479-480, the Court enunciated this rule:

“While it is true that this Court is not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings, the rule is not absolute and does not preclude reference to the opinion for all purposes whatsoever. It is well established that in case of ambiguity, extrinsic aid may be sought in order to settle the meaning of a statute or a contract. We see no reason why the principle of that rule does not permit reference to the opinion of the Court in order to clarify the meaning of a finding otherwise in doubt.”

The application of this rule may well clarify the confusion in this case. Counsel for Appellee personally prepared the findings after the Court issued its written opinion. The custom in Alaska is that counsel prepares the findings which are based upon the opinion and the Court signs the same in a very perfunctory manner. However, the Court personally writes its own opinions. The conclusion in the Trial Court's opinion that there *was* a Commission in existence is based upon the undisputed fact in the record that the new Commission had qualified. (Defendant's Exhibit “C”, R. 163.) The Trial Court frankly admitted the existence of a Commission at the time Regulation 10 was promulgated but declared the regulation void on the theory that McLaughlin acted pursuant to a delegated power which was non-delegable in nature and hence could only be exercised by the Commission.

(R. 49 and 50.) But Appellant has shown that the power to subscribe seasonal periods for *previously classified* employers is a delegable power and as a matter of fact it would be virtually impossible for the agency to operate were it not delegable and the Commission had to exercise it itself. (See Issue II, pp. 28-35 of Appellant's Opening Brief.)

2. Finding No. 11 states:

"That former Acting Director McLaughlin had no power or authority on June 29, 1953, to promulgate any regulation affecting seasonal employment in the Territory, or any other regulation of the Commission, and such authority as might have been delegated to him at one time under the old Commission did not exist on June 29, 1953, and could not be exercised on or after that date. The purported amended Regulation No. 10 is, therefore, void and no appeal to the Commission is necessary and no pursuit of any administrative remedies was necessary to attack the validity of pretended amended Regulation No. 10 and no appeal to any administrative body is required from an invalid order made by one without authority."

The erroneous conclusions in this finding, broken down for analysis, are as follows:

(a) That McLaughlin had no authority or power on June 29, 1953 to promulgate or issue any type of regulation,

(b) That any authority delegated to McLaughlin by the old Commission expired when the repealing statute, Chapter 82, SLA 1953, was enacted.

(c) Based on (a) and (b) above, Regulation No. 10 was void and no appeal therefrom is necessary.

The conclusions in Finding No. 11 must, by necessity, be erroneous if this Court, like the Trial Court, applies the simultaneous repeal and re-enactment doctrine and thereby recognizes the continual existence of the Commission.

3. Finding No. 6 states:

“That neither the former Acting Director McLaughlin nor the Employment Security Commission of Alaska had, prior to June 29, 1953, or at any other time, made any classifications of seasonality in employment in the Territory, except those attempted to be made by purported amended *Regulation No. 10, which attempted to apply seasonality to the salmon canning industry as an industry*. No other industries or employers have been classified as seasonal.” (Italics added.)

The italicized provision of this finding is manifestly erroneous. A cursory examination of the regulation itself, discloses that it merely prescribes seasonal periods “*for certain employers engaged in the canning of salmon \* \* \**.” It does not prescribe “seasonality” for the employer since the determination of seasonality, a previous separate and distinct act, (not a regulation) was accomplished by notification, in writing, to certain employers of their seasonality status. This written classification was subject to appeal to the full commission. (See Defendant’s Exhibit “B”.)



## 4. Findings 12, 17 and 18:

Insofar as these findings state that Appellee and Intervenor have been or are threatened with irreparable injury to themselves, they are erroneous for the reason that nowhere in the record is there one scintilla of evidence in support thereof.

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## II.

**APPELLEE AND INTERVENOR HAD NO LEGAL  
CAPACITY TO SUE.**

This Court, in stating that “any persons having a legal interest and suffered injury by threatened enforcement would be entitled to have judicial restraint placed upon those presuming to act upon it,” appeared to give no consideration to Points 3 and 6 under Issue I of Appellant’s Opening Brief. These points substantiated by the record and competent authority force one to conclude that the Appellee and Intervenor, since neither were irreparably injured by the enforcement of the regulation but on the contrary were benefited thereby, did not have a legal interest upon which to sue and in no event were they entitled to an injunction since neither suffered irreparable injury. Cf. *Sheldon v. Griffin*, 174 Fed. (2d) 382, 384 (CCA 9th); *Jeffrey v. Blagg*, 235 U.S. 571, 576; *Hess v. Mullaney*, 213 Fed. (2d) 635, 640; *Sheldon v. Wade*, 130 Fed. Supp. 212 (Alaska).

## III.

**THE COURT'S RULING THAT JURISDICTION OVER THE SUBJECT MATTER AND PERSONS MUST BE PLEADED AND PROVED BY THE ADMINISTRATIVE AGENCY, IS CONTRARY TO DECISIONS BY THE UNITED STATES SUPREME COURT.**

In ruling, in effect, that "Jurisdiction of the subject matter and persons must be pleaded and proved by the Administrative Agency promulgating the regulation," the Court failed to consider:

(1) the presumption of validity attaching to all administrative regulations which thereby imposes the burden of proof on the persons attacking the regulation and

(2) the fact that in this case the Executive Director representing the agency is a party-defendant and therefore, has no occasion to plead and prove jurisdiction.

#### **Presumption of Validity.**

By ruling that the administrative agency must "plead and prove jurisdiction over the subject matter and persons this Court's ruling is in direct conflict with decisions of the United States Supreme Court and other Courts of Appeal. The United States Supreme Court in *Pacific States Box and Basket Co. v. White*, 296 U.S. 176, 185, 80 L.ed. 138, 146, laid down the following rule of law which appears to be directly contrary to that rule enunciated by the Court herein:

"When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presump-

tion of the existence of that state of facts, \* \* \* It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation.' *The contention is without support in authority or reason, and rests upon misconception.* Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. (Cases cited.) But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. (Cases cited.)" (Italics supplied.) Cf. *U.S. v. Chemical Foundation*, 272 U.S. 1, 14, 15.

The magnitude of this Court's ruling must be fully realized. It wipes away the presumption of validity attaching to all regulations passed by an administrative agency. In *State Corporation Commission of Kansas v. Wall*, 113 Fed. (2d) 877, 880 (CCA 10th), the Court stated:

“\* \* \* Where an administrative board acts within the line of its official duties, its orders are presumed to have been regularly, properly, and legally made.”

Decisions of other Courts of Appeals which hold contrary to this Court's ruling are *Continental Distilling Company v. Humphrey*, 220 Fed. (2d) 367, 371 (C.A.D.C.); *U.S. v. Obermeier*, 186 Fed. (2d) 243, 247 (C.A. 2nd); *U.S. v. Johnson*, 87 Fed. (2d) 155, 157 (C.A. 10th). See 42 Am. Jur. *Public Administrative Law*, Section 240; *Procter and Gamble Co. v. Coe*, 96 Fed. (2d) 518, 521 (C.A. D.C.).

A final point not considered by this Court is the conclusive effect that Section 51-5-7 (i) ACLA 1949 gives to findings of the Commission. See Footnote 4 (*supra*).

**The Executive Director and the Administrative Agency Are Party-Defendants Herein.**

In stating that the burden is on the administrative agency to “plead and prove jurisdiction over the subject matter and persons”, the Court apparently failed to consider the fact that the Executive Director, representing the agency, is the party-defendant herein. As such, he was only required to answer the complaint and was under no legal duty to affirmatively plead and prove jurisdiction. See 73 C.J.S., *Public Administrative Bodies and Procedure*, Section 104 (c) and Section 267.

An examination of paragraphs one and seven of Appellee's Amended Complaint (R. 3, 11-12) clearly

discloses that the Appellee alleged the necessary jurisdictional facts to give the Commission jurisdiction over "the subject matter and persons" herein. Paragraph one states that the Appellee is "engaged in the fishing, packing, canning and shipment of canned salmon at Ketchikan, Pillar Bay and Cook Inlet, Alaska,". By this allegation plaintiff is an "employing unit" within the definition of Section 51-5-1 (g) ACLA 1949,<sup>5</sup> and therefore, the Commission has jurisdiction over "the subject matter" (seasonality) and "persons" (plaintiff corporation as an employing unit). Furthermore, paragraph seven of the Amended Complaint alleges that the Executive Director lacked authority to promulgate the subject regulation. By making this allegation, the Appellee took upon itself the burden of proving said lack of authority to issue the regulation. It is extremely difficult to understand how this Court in the face of the above considerations, can now hold: (1) that the burden is on the administrative agency, as a party-defendant, to plead and prove jurisdiction of the subject matter and persons, and (2) that such jurisdiction does not exist since it has been alleged to exist by the plaintiff-appellee.

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<sup>5</sup>Section 51-5-1(g) states in part as follows:

" 'Employing Unit' means any individual or type of organization, including any \* \* \* corporation, whether domestic or foreign, \* \* \* which has, or subsequent to January 1, 1937, had, in its employ one or more individuals performing services for it within this Territory. All individuals performing services within this Territory for any employing unit which maintains two or more separate establishments within this Territory shall be deemed to be employed by a single employing unit for all the purposes of this Act. \* \* \* "

## IV.

**CRIPPLING EFFECT OF DISTRICT COURT'S DECISION.**

The Court apparently has not considered the fact that the District Court's decision has the practical effect of virtually crippling the Unemployment Compensation Fund of the Territory.

Pursuant to stipulation of counsel, the Trial Court signed an order impounding \$650,000.00 of Unemployment Compensation Funds pending the outcome of this litigation. (R. 72.) The major portion of these monies will be disbursed in the event an ultimate appellate decision does not set aside what we consider to be an erroneous District Court ruling that the regulation is void.

The vital significance affixed to the outcome of this litigation is apparent to all persons who are interested in preserving the solvency of Alaska's Unemployment Compensation Fund. In view of the very critical condition of this Fund it is sincerely felt that the Court should grant a rehearing and then render its decision in an atmosphere devoid of confusion. To affirm the Trial Court's decision in the air of confusion which surrounds this litigation, most surely will result in a miscarriage of justice.

## V.

**SUBSEQUENT LEGISLATIVE ENACTMENTS DID NOT  
EFFECT THIS LITIGATION.**

The last sentence of the Court's opinion which is a statement to the effect that subsequent legislative developments have left in this Court's mind "no doubt of the validity of the result," is indeed perplexing.

The Appellant is not exactly sure what subsequent legislative events the Court is alluding to but if it means that legislation pertaining to any issue in this litigation has been enacted which would support a decision that Regulation No. 10 is void, the Court has been misinformed. There have been only two legislative enactments pertinent to the subject matter of this case: One is the recent Federal Statute<sup>6</sup> which authorizes the Alaska ESC, notwithstanding restrictions in Alaska's Organic Act, to borrow money from the Federal Government to replenish the Territory's

---

<sup>6</sup>Public Law 56 84th Congress approved by the President June 1, 1955, reads as follows:

"That the Governor of Alaska is authorized and empowered, notwithstanding any provision of the Organic Act of Alaska, or any other Act of Congress, or any of the Territorial laws, to the contrary, to obtain from the Federal Unemployment Fund, established pursuant to the 'Employment Security Administrative Financing Act of 1954' (Public Law 567, Eighty-third Congress, approved August 5, 1954), and subject to the conditions in said Act, such advances as the Territory of Alaska may qualify for and as may be necessary to obtain for the payment of unemployment compensation benefits to claimants entitled thereto under the Alaska employment security law: *Provided*, that the general fund of the Territory of Alaska from which advances have been made for the payment of unemployment compensation benefits shall be reimbursed from advances made through the Governor of Alaska from the Federal Unemployment Fund."

depleted Unemployment Compensation Fund.<sup>7</sup> The other was the enactment by the Territorial Legislature of Chapter 5, Extraordinary Session Laws of Alaska, 1955 which statute in substance, is a recompilement with minor additions, of the Territory's previous Employment Security statute. Chapter 5 effectuated no far-reaching substantive changes in Alaska's employment security law and in no conceivable way is its enactment relevant to the issues in this litigation.

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### CONCLUSION.

The Court is most respectfully requested to grant a rehearing for the reasons above set forth.

Dated, Juneau, Alaska,  
October 5, 1955.

J. GERALD WILLIAMS,  
Attorney General of Alaska,  
By: EDWARD A. MERDES,  
Assistant Attorney General,  
*Attorneys for Appellant  
and Petitioner.*

---

<sup>7</sup>Shortly after the enactment of the Federal Statute, the Territory borrowed approximately \$2,000,000.00 from the Federal Government to replenish its depleted fund.



## CERTIFICATE OF COUNSEL

I, Edward A. Merdes, attorney for Appellant, do hereby certify that the foregoing petition for a rehearing of this cause is well founded and is presented in good faith and not for purpose of delay.

Dated, Juneau, Alaska,

October 5, 1955.

EDWARD A. MERDES,

Assistant Attorney General,

*Of Counsel for Appellant  
and Petitioner.*



No. 14518

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United States  
Court of Appeals  
for the Ninth Circuit

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NAT YANISH,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration  
and Naturalization Service,

Appellee.

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Transcript of Record

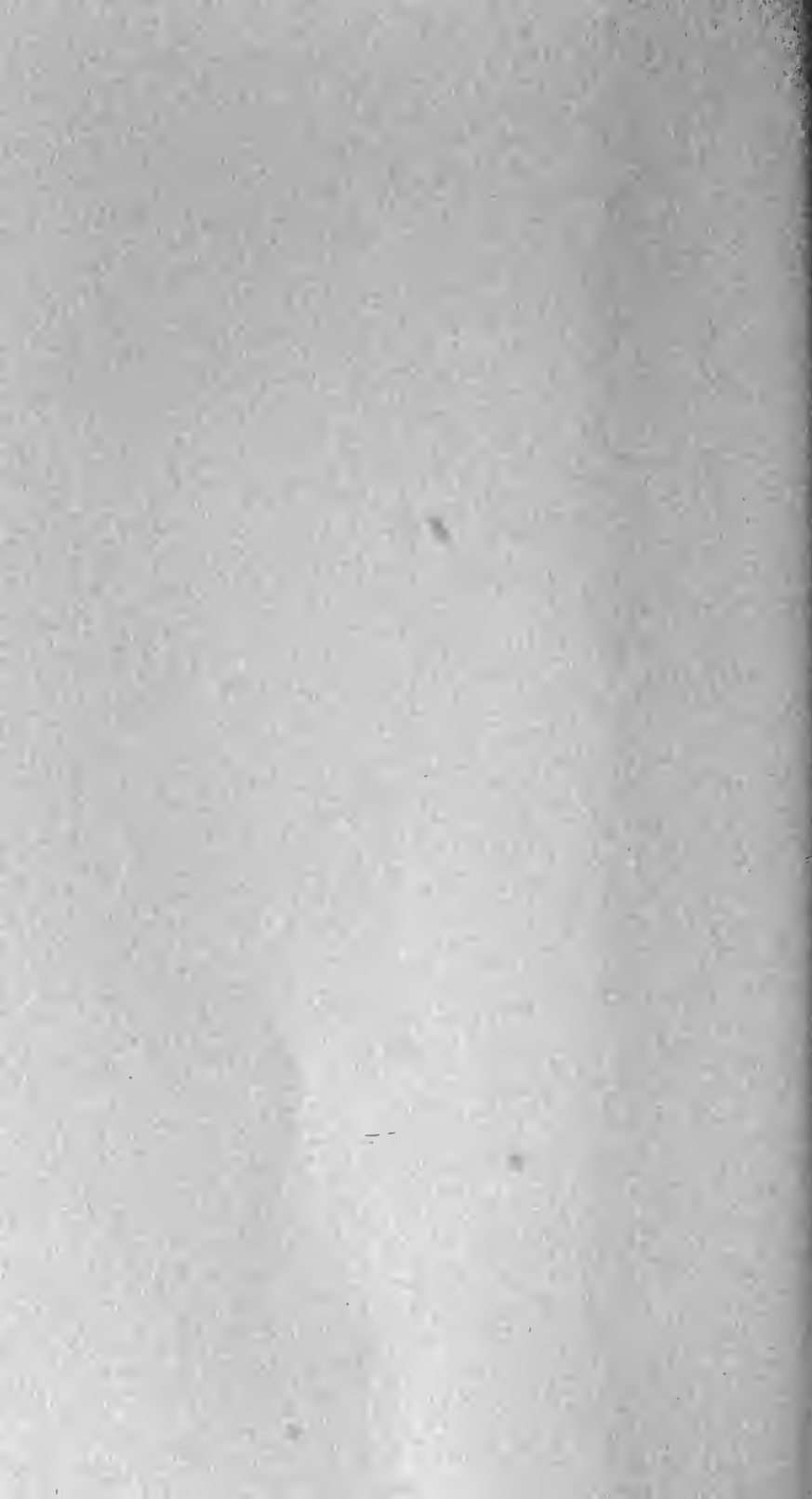
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Appeal from the United States District Court for the Northern  
District of California, Southern Division

FILED

MAY - 6 1955

PAUL P. O'BRIEN, CLERK



No. 14518

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United States  
Court of Appeals  
for the Ninth Circuit

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NAT YANISH,

Appellant,

vs.

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Transcript of Record

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Appeal from the United States District Court for the Northern  
District of California, Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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Post Office Building,  
San Francisco, California,

Attorneys for Respondent and Appellee.



In the United States District Court for the Northern District of California, Southern Division

No. 29013

NAT YANISH,

Petitioner,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Respondent.

### ORDER TO SHOW CAUSE

The petitioner herein having heretofore filed his petition that the respondent Bruce Barber be held in contempt, and the mandate of the Court of Appeals for the Ninth Circuit in this cause (No. 13,836 in the records of the said Court of Appeals) having been spread upon the record of this Court, and pursuant to the said mandate, and good cause appearing therefor,

It Is Hereby Ordered that the respondent Bruce Barber be and appear before this Court on the 9th day of June, 1954, then and there to show cause if any he have why this Court should not:

(1) Hold said respondent in contempt of court for violation of that certain permanent injunction heretofore granted on July 28, 1950, in the within cause, by requiring and demanding of petitioner Nat Yanish a bond conditioned in terms other than those under which petitioner was at liberty pursuant to the said prior permanent injunction of this Court and by imprisoning the petitioner for failure

to comply with the said demands and requirements;

(2) Hold said respondent in contempt for violation of the said permanent injunction by threatening to imprison and by imprisoning the petitioner Nat Yanish;

(3) Impose upon said respondent such a fine as will reasonably compensate petitioner for his damages suffered as a consequence of the respondent's said acts, including reasonable costs and attorneys fees incurred by petitioner as a consequence thereof.

Done in Open Court this 26th day of May, 1954.

/s/ GEORGE B. HARRIS,

United States District Judge

[Endorsed]: Filed May 26, 1954.

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[Title of District Court and Cause.]

### ORDER

The matter of the return to the order to show cause in the above matter having come on for hearing, and evidence having been introduced and argument heard, and the court being fully advised in the premises finds that respondent was on March 9, 1953, in technical contempt of the order of Judge Lemmon dated July 20, 1950, enjoining respondent from imposing conditions in a delivery bond, when he notified petitioner that conditions would be imposed; that respondent was acting in good faith under what he thought was the applicable pro-

visions of the McCarran Act (Immigration and Nationality Act of 1952, Public Law 414, effective December 24, 1952, 8 USC 1101 et seq.) and by written direction of his superior officer, the Commissioner of Immigration and Naturalization in Washington; that at the time petitioner was taken into the custody of respondent on March 17, 1953, his status under the provisions of Public Law 414 had changed in that on March 11, 1953, the order for deportation of petitioner became final and that he was so notified on March 16, 1953; that on March 16, 1953, a judge of this court declined to entertain petitioner's petition herein and to issue an order to show cause, and that the Court of Appeals for the Ninth Circuit reversed the said order of the District Judge and directed that the order to show cause issue; upon the foregoing:

It is ordered, adjudged, and decreed that no sanctions be imposed upon respondent, nor reparation be awarded to the petitioner.

Dated: July 12, 1954.

/s/ O. D. HAMLIN,

United States District Judge

[Endorsed]: Filed July 13, 1954.

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[Title of District Court and Cause.]

## RETURN TO ORDER TO SHOW CAUSE

Comes now Bruce G. Barber, District Director, Immigration and Naturalization Service, San Fran-

.

cisco District, by and through his attorneys, Lloyd H. Burke, United States Attorney, and Charles Elmer Collett, Assistant United States Attorney, and for cause why he should not be held in contempt of this Court, admits, denies and alleges as follows:

I.

Jurisdiction is for the Court's determination.

II.

Admits the allegations in paragraph II of the petition.

III.

Admits the allegations in paragraph III of the petition.

IV.

Admits the allegations contained in paragraph IV of the petition.

V.

Admits the allegations contained in paragraph V of the petition.

VI.

Admits the allegations contained in paragraph VI of the petition. Respondent alleges that on March 11, 1953 the order of deportation of petitioner became final and that petitioner received notice thereof on March 16, 1953.

VII.

Denies the allegations contained in paragraph VII of the petition.

VIII.

Admits the allegations contained in paragraph VIII of the petition.

IX.

Petitioner failed to post bond as required and following the order of this Court denying the relief prayed for was taken into custody on March 17, 1953.

X.

Admits the allegations contained in paragraph X of the petition.

XI.

Denies the allegations of paragraph XI of the petition. Respondent alleges that the order of this Court dated July 28, 1953 restrained the respondent from imposing conditions in the said immigration bond which were not authorized by the then existing Statutes. Public Law 414, the Immigration and Nationality Act of 1952, became effective December 24, 1952. Section 242 of said Act vested the Attorney General of the United States with authority to impose conditions in such bond. Acting under the authority and by direction of the Attorney General of the United States respondent sought to impose conditions prescribed by the said Attorney General in the case of this petitioner. Respondent acted solely under the authority, direction and prescription of the said Attorney General and in accordance with Public Law 414 (66 Stat. 163).

Wherefore Respondent prays that the order to

show cause be discharged and the relief prayed for be denied.

Dated: June 16, 1954.

LLOYD H. BURKE,

United States Attorney

/s/ By CHARLES ELMER COLLETT,

Assistant United States Attorney

[Endorsed]: Filed June 16, 1954.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Appeal is hereby taken from the Order made herein on July 12, 1954, and entered on July 13, 1954, in the above cause, insofar as said Order ordered, adjudged and decreed that no sanctions be imposed upon Respondent Bruce G. Barber, and insofar as said Order ordered, adjudged and decreed that no reparation be awarded to petitioner, Nat Yanish.

Dated: August 9, 1954.

ALLAN BROTSKY,

LLOYD E. McMURRAY,

BENJAMIN DREYFUS,

FRANCIS J. McTERNAN, JR.,

/s/ By FRANCIS J. McTERNAN, JR.,

Attorneys for Petitioner

[Endorsed]: Filed August 10, 1954.



[Title of District Court and Cause.]

## DESIGNATION OF RECORD ON APPEAL

Comes now appellant Nat Yanish and designates the record on appeal to the Court of Appeals for the Ninth Circuit from the decision of the above-entitled Court dated July 12, 1954, entered on July 13, 1954, in the above cause, to wit, the entire record in said cause, as follows:

1. The order to show cause issued by the District Court herein on May 26, 1954.

2. The return to the order to show cause, dated and filed herein June 16, 1954.

3. The order of said District Court dated July 12, 1954, and filed herein July 13, 1954.

4. The record of oral proceedings taken before said District Court on June 30, 1954.

5. All exhibits offered, whether received or rejected.

6. Notice of appeal filed herein August 10, 1954.

7. This designation of record on appeal.

Dated: August 27, 1954.

GLADSTEIN, ANDERSEN &  
LEONARD,

LLOYD E. McMURRAY,  
BENJAMIN DREYFUS,  
FRANCIS J. McTERNAN, JR.,

/s/ By LLOYD E. McMURRAY,  
Attorneys for Petitioner-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed August 27, 1954.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Order to show cause.

Return to order to show cause.

Order.

Notice of Appeal.

Designation of record on appeal.

Petitioner's exhibits 1, 2, 3, 4 and 5.

Respondent's exhibit A.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 17th day of September, 1954.

[Seal]                      C. W. CALBREATH,  
                                    Clerk  
/s/ By WM. C. ROBB,  
                                    Deputy Clerk

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE  
RECORD ON APPEAL

Good cause appearing therefor,

It Is Hereby Ordered that the time within which plaintiff-appellant may prepare and docket the record on appeal herein is hereby extended to and including October 18, 1954.

Dated: September 17, 1954.

/s/ EDWARD P. MURPHY,  
United States District Judge

[Endorsed]: Filed September 17, 1954.

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In the United States District Court for the Northern District of California, Southern Division

No. 29013

NAT YANISH, Plaintiff,

vs.

BRUCE BARBER, et al., Defendant.

TRANSCRIPT OF PROCEEDINGS

June 30, 1954

Before: O. D. Hamlin, Judge.

Appearances: For Plaintiff: Lloyd McMurray, Esq. For Defendant: C. Elmer Collett, Esq., Asst. United States Attorney. [1\*]

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\* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Clerk: Yanish vs. Barber; Order to show cause. [2]

\* \* \* \* \*

The Court: I think counsel could stipulate as to what the facts are very briefly here today. I think I am familiar with the facts from reading the file.

Mr. McMurray: It is my view that we should put in evidence showing the results of the contempt on the plaintiff, the costs to him, and all the incidents of it, which could not be stipulated to by counsel, I am sure.

The Court: Why not? There is no dispute as to what happened, is there counsel?

Mr. MacMurray: I do not think so.

The Court: Why can't we go ahead this morning?

Mr. McMurray: I can go ahead, your Honor, if I may have leave to complete the evidence at a later date. I wanted to have an expert witness here as to one aspect of the matter.

The Court: As to what aspect do you want an expert?

Mr. McMurray: As to the value of the legal services or [3] the reasonable cost of the legal services involved on behalf of the plaintiff, since I understand that that is properly included.

The Court: Counsel, I will state now that I would not be inclined to award any legal services, so you may know the Court's position.

Mr. McMurray: Your Honor, I have found no authority indicating that the plaintiff in this case,

Mr. Yanish, would not be entitled to it. In fact, the cases indicate that he is entitled to the costs or reasonable costs of his expenses for attorneys' services, and in this case, your Honor, that is a very substantial matter. It involved the filing of two actions in the District Court here, taking those appeals, going to the Justice of the Supreme Court for bail, arguing motions in the District Court, and arguing the case in chief and also motions in the Court of Appeals. It involved a great deal of work, a considerable amount expense, and I should like, if I may, to submit some authority to your Honor on this point if there is any doubt. It had not occurred to me that it was in doubt. The original provision asked that the defendant be held in contempt of court, and it is one of the things that has been most important in the litigation, that by his act the respondent, Barber, has caused Yanish to procure attorneys to represent him in three different courts and to argue and brief some very difficult and serious questions of law. [4]

\* \* \* \* \*

Mr. Collett: If the Court please, I have two matters that were set before Judge Roche. I did not know what your Honor was going to do this morning. I took it that the matter would be submitted and you would make your ruling. Likewise we have submitted a line of authority with regard to the responsibility of a government official acting within the scope of his employment, at the direction of his superior officer, and not being liable for damages, even though your Honor has held him

in technical contempt as such. The record here is clear that he acted in accordance with the authority of the Attorney General and by direction of the Attorney General, which is uncontroverted.

We have also set forth the sequence of facts, which show that at the time the actual petition or application was made before this Court to adjudge the district director in contempt of court, his status at that point changed and he was on that day subject to deportation. So any matter pertaining to what counsel was contending relates solely and exclusively to the period from March 9 until March 16, at which time the petition was filed. During that interim, even though the original letter which was sent, as Your Honor states, was a technical contempt, on March 16 he was then subject to deportation and the matter was an entirely different proceeding from there on. I think that has to be determined by your Honor, but on both [5] of those grounds, although you say there was a technical contempt, I think the holding in addition should be that there has been no damage, and even if there were, it is diminimis and, second, the district director as an official, having acted in the course and the scope of his employment and direction of his superior officer, is not responsible for any such damage.

Mr. McMurray: Your Honor, I would like to reply to that, if I may, briefly. First of all, there has been no showing here and no evidence here that the action taken by the respondent was taken at the direction of a superior officer. In the second place,

in my view it would be immaterial if it had been done by direction of a superior officer. In the third place, the line of authorities cited by the respondent do not stand for the proposition that in a contempt proceeding a government official is not personally liable. They stand for the proposition that in an action for damages or for an injunction the officer is not personally liable. The court in *Lyon* against *Sawyer* clearly rejected the claim that that line of cases apply to a contempt matter. So I think the matter of damages which will compensate Mr. Yanish is properly before the Court and the respondent is liable. [6]

\* \* \* \* \*

Mr. McMurray: First, your Honor, I will ask the Court to take judicial notice of the records of the case in this Court and in the Court of Appeals and the records of the Supreme Court of the United States. In both cases, the habeas corpus action which was number 13785 in the records——

The Court: That is the habeas corpus matter.

Mr. McMurray: That is the habeas corpus case.

The Court: That was the one that was dismissed as moot.

Mr. McMurray: That is right, your Honor. The actions were combined for argument up to the time when that case was dismissed as moot. The other case, 13836——

The Court: Which one was that?

Mr. MacMurray: That was the contempt matter in the Court of Appeals.

The Court: That is the one that was remanded back.

Mr. McMurray: That is the one that was remanded back. In the Supreme Court that matter has no regular official number. It was decided by Mr. Justice Douglas in chambers and the copy of the decision which was furnished to us bears no number. It has a space for a number and it is blank. I could offer for the Court's convenience a printed copy of the decision of [11] Mr. Justice Douglas on the application for bail pending appeal.

The Court: That is not recorded.

Mr. McMurray: That is recorded in the Supreme Court Reporter but not in the official reports of the Court. Apparently, your Honor, the decisions of individual justices in chambers are not ever reported in the official reporter but they are reported in the Supreme Court Reports.

The Court: All right.

Mr. McMurray: In the Lawyer's Edition. The matters which I ask your Honor to take judicial notice of include the motions that were made in these actions for bail pending appeal, which was denied here, denied in the Court of Appeals, and granted by Mr. Justice Douglas.

I will call Mr. Yanish as the first witness.



NAT YANISH

called as a witness on his own behalf and being first duly sworn testified as follows:

Direct Examination

Mr. McMurray: Mr. Yanish, you are the plaintiff and the petitioner in this case, are you not?

A. I am.

Q. On March 17, 1953 were you taken into custody by officers of the Immigration and Naturalization Service in San Francisco? A. Yes. [12]

Q. When you were taken into custody where were you, Mr. Yanish?

A. In the offices of my attorneys at 240 Montgomery.

Q. You were present at the time when I as your attorney telephoned to Mr. Barber, is that right? A. That is right.

Q. And told him that you were there and that you would not post the bond or surrender to him, is that correct?

A. Will you restate that again, please?

Q. You were present, were you not, when I telephoned to Mr. Barber and told him that you were there in my offices, that you would not post the bond which he had demanded that you post, and that you would not surrender to him?

Mr. Collett: I object, if the Court please. I think that that is all hearsay as far as this witness is concerned.

The Court: I will permit that answer. Do you expect to put on some testimony, Mr. Collett?

(Testimony of Nat Yanish.)

Mr. Collett: I at the moment do not expect to.

The Court: I would think you should. Give a little thought to it. Go ahead.

A. Yes.

Mr. McMurray: It was following that conversation that officers of the Immigration Service appeared in my office and arrested you and took you to the Immigration Service headquarters on Sansome Street in San Francisco, is that correct?

A. They took me to the Sansome Street prison, yes. [13]

Q. Mr. Yanish, when you were taken there what occurred immediately after you were taken into the detention quarters of the service?

A. The agents were about to book me. They received word that Stan Olson, one of the immigration chiefs there, wanted to see me before I was booked. I was then taken down by the immigration agents, down to Mr. Olson's offices where Mr. Olson asked me if I wanted to sign the agreement to post new bail. I stated to him that my attorneys had made my position clear. He tried in several ways to get me to state that I would sign, post a new bail.

Q. Will you tell us what he said as near as you remember and what you said to him?

A. When I repeatedly stated my attorneys had made my position clear, he said, "If that is the case, you will rot in this place until you do post new bail."

Q. What occurred immediately after that?

A. After he threatened that I would rot in the

(Testimony of Nat Yanish.)

prison there until I posted new bail, he turned to the immigration agents and said, "Take him away," at which point I was taken upstairs again, finger printed, mugged, booked, frisked, and thrown into one of their cells on Sansome Street.

Q. You were kept in that cell then, were you, from March 17 until what date?

A. Until May 27. [14]

Q. Were you in the same cell at all times?

A. Yes.

Q. Would you describe that cell?

A. It is a long cell, about the length of this courtroom. The windows are all barred.

The Court: For the record might we get a stipulation as to the length of the courtroom? I do not know myself what it is.

Mr. McMurray: 50 ft.?

The Court: Approximately 50 ft., counsel.

Mr. Colett: I would say so, 50 or 60 ft.

The Witness: Double tiered, metal bunks.

Mr. McMurray: How many of those bunks were there?

A. Pardon me?

Q. How many of those double bunks were there?

A. I think there were about twenty to the best of my recollection.

Q. What other accommodations were there in the room?

A. There were two small tables and about four chairs, old chairs. At the other end of the cell there

(Testimony of Nat Yanish.)

was some old benches available that were very seldom dragged in to be used.

Q. Where there any sanitary facilities connected with the cell?

A. Yes, there were two rooms, one that had two shower stalls in them, and a large basin for washing clothes, and the other small room had two or three toilets and a couple of wash basins. [15]

Q. And those were connected directly with the cell, were they?      A. Yes.

Q. How many men occupied that cell with you?

A. Well, to the best of my recollection they came and went. People were brought in, bailed out, and there was a large turnover. In the 70 days I was there I would estimate there were several hundred people in that little cell, but at one time the maximum—these were all mostly Europeans in there, but at one time I think the maximum amount of people that were there were, I would say about 30 or 35. I just don't recall exactly.

Q. What was the minimum number?

A. It was pretty close to the maximum. However, the number of people in there hovered around that figure.

Q. When you say this was a cell, you have reference to the fact that the windows were barred, is that right?      A. Yes.

Q. Was the door locked?

A. The doors were locked most of the time.

Q. Were you confined to that cell during the

(Testimony of Nat Yanish.)

greater part of each day and each night you were there?      A. Practically all the time.

Q. Would you describe for us the routine that you went through there in an ordinary day in that cell? You would be [16] sleeping in one of these double bunks, is that right?      A. Yes.

Q. What time did the day begin there?

A. I think it was about 5:30 in the morning when the guard would waken us.

Q. How would he awaken you.

A. He would shout, "Get up. Time to get up." He would unlock the door, walk in, and wake us up, call us.

Q. Then you would get up and dress, I suppose, and go to breakfast, is that right?

A. That is right.

Q. About what time was breakfast?

A. Well, it varied, but usually it was around 7 o'clock in the morning. It varied with the number of prisoners they had. Sometimes they would have mass round ups of people in the community—Santa Clara Valley, the Sacramento Valley, the Bay Area. They would bring in large numbers, at which time our meal hours varied. But as a rule during the so-called normal hours there we would have breakfast about 7 o'clock in the morning. [17]

\* \* \* \* \*

Mr. McMurray: Tell us what you had for breakfast as a general thing.

A. Usually we would get a little cold cereal with skimmed milk, some cold watery coffee, I think it

(Testimony of Nat Yanish.)

was. Hard to tell whether it was coffee or tea. And bread.

Q. Did you have fruit?

A. Very, very rarely we would get a dish with a piece of dried fruit on it or canned fruit.

Q. You say you had bread also?

A. Yes. You could get all the bread that you wanted there.

Q. And butter?

A. No, no butter to my recollection. There might have been possibly on Easter morning I think we got some buttered toast or something, and on an occasional Sunday we might have had something like that. It was not the kind of breakfast I eat at home.

Q. After breakfast what would happen then?

A. We would be taken back and locked up again in the cell.

Q. What was the next regular event on the day's schedule?

A. About 11:30 in the morning the door would be unlocked and we would be led out to lunch.

Q. What did your lunch ordinarily consist of?

A. As a rule I think we—it was hard to—I know the first couple of weeks I couldn't look at the lunch too closely, [18] so I do not have too clear a recollection as to what was on that tin on which everything was dumped. The mess kit——

Q. You were served in cafeteria style?

Mr. Collett: I ask that that answer be stricken as not responsive to the question.

(Testimony of Nat Yanish.)

The Court: Motion denied.

The Witness: It is responsive in the sense that I am trying to think of what we were served.

Mr. McMurray: You were served in cafeteria style, were you?

A. Yes, we were lined up and held our mess kit out, and the trusties there would slop the stuff on the mess kit, and when we were to get this mess kit full of the slop, then they would throw a couple of pieces of bread on top of it.

Q. Do you remember what type of food there was? Did you get meat?

A. No, the meat that we did get was normally all chopped in real fine gravy.

Q. Did you get meat every day?

A. No, no, very seldom. I don't recall, but very seldom, and usually it was in this chopped up style, for example hash style, but, you don't even get as much meat in the hash there as you do on Third and Howard. It was very skimpy. The proteins there were practically nonexistent, although occasionally it would appear in one form or another and one amount or [19] another.

Mr. Collett: I will move that the answer be stricken as conclusions and opinions. He can state what he received.

The Court: I will permit the answer to stand.

Mr. McMurray: Q. What did you receive by way of vegetables at lunch time? Let me broaden my question and ask you to direct your answer to

(Testimony of Nat Yanish.)

lunch and to dinner also. Did you receive any vegetables?

A. Mostly potatoes in one form or another—potato salad, boiled potatoes, and on Sundays we would get two or three fried potatoes. Occasionally some vegetable like spinach, or something else would appear out of a can. I suppose it was healthy to eat, but it was served so unpalatably that we usually left it.

Q. Is it a fair statement that you usually had some vegetable other than potatoes with your meals?

A. Well, yes, I would say possibly something appeared on the mess kit. If you dug into the mess kit you would usually find something in one form or another.

Mr. Collett: I am going to object to that. There is no time. These are all general observations. There is nothing to be identified at any time except the place, and I ask that it all be stricken.

The Court: Motion denied.

Mr. McMurray: Q. When you had been served with this [20] food on the mess kit where did you eat it?

A. There were long tables in the mess hall where we grabbed a place and ate, with guards on either end of the table.

Q. With guards on either end?

A. With guards on either end and one in the hallway.

Q. When you finished lunch what happened then?



(Testimony of Nat Yanish.)

A. We were ordered back into our cells and locked up again.

Q. When you traveled from your cell into the mess room or from the mess room into the cell how did you travel? Did you just walk along the hall or did you have to go up and down elevators?

A. Yes, there was one flight of steps that we walked up.

Q. Were there any guards accompanying you?

A. No, but they were stationed along the hall ways so that on either end, as the prisoners marched down the hall and up the stairs, there were plenty of guards there in and about.

A. After you were locked up again after lunch, was there any other regular routine before dinner or did you just remain there until dinner time?

A. No, the usual procedure was to be locked up until dinner time. Of course, it varied. About once a week we would be allowed out to go to the laundry and get our linen, then sometimes the door would be unlocked, and we would be permitted to go into the library, were we would be permitted to browse around the very skimpy, meager supply of books there, select a [21] book, and go back to the cell, and twice a week we would be permitted visitors.

Q. Were you given any opportunity for exercise?

A. Irregularly. We were permitted to go upstairs on a concrete patio. No equipment, sun beating down on you when there was sun, and the wind—the Sansome Street-Montgomery Street wind

(Testimony of Nat Yanish.)

would scoot in there, and most of the prisoners could not stay there very long. But we were permitted theoretically to stay there a couple of hours. About 20 minutes would be the most we could take. There were no benches, no protection from the elements, and so you just marched up on to the concrete patio and there you were.

Q. Where is this patio located?

A. I think it is on the 14th or 15th floor for the men.

Q. While you were out there did you have an opportunity to engage in games?

A. No, we were not permitted to carry any balls up there, the theory being that if a ball would fall down 15 flights of stairs on Sansome Street, somebody may be walking out of 630 Sansome Street and a ball might hit them on the head. But some of the ingenious prisoners would wrap up a piece of paper, put some string around it, and manufacture a ball and it would not last very long. But for a few minutes we would be able to toss it around. No recruits for major league baseball developed at 630 Sansome.

Q. You did not have to stay, I gather, until the end of the two hour period?

A. No, that is one punishment they did not require.

Q. When the exercise period was over there you would go back to your cell again, is that right?

A. When we had enough of the elements up there, when we were exhausted, we came down, which in my case was in about 10 or 15 minutes.

(Testimony of Nat Yanish.)

Q. After that, I suppose, you were taken in the usual manner to dinner, is that right?

A. Yes, the door would be unlocked and we were marched out to dinner.

Q. After dinner you would again be returned to your cell?      A. That is right.

Q. Was there any activity provided in the evening or did you just stay there in your cell?

A. Well, we just stayed there in the cell. However, at one time some of the prisoners got together and pooled some money and were able to rent an old television set, and once a month we had a collection in the cell and were able to keep up the payments, the rental on it. \* \* \* \* \*

Q. Was there any regular light-out time or anything of that [23] sort?

A. I think about 10 o'clock the lights went out.

Q. And then you retired for the night?

A. We were supposed to retire for the night, yes.

Q. If you wanted to write or read or something of that sort were you able to continue it after light-out?

A. No, not unless you wanted to go into the toilet and sit down on a bowl. There was a small light that was permitted to be on all night there.

Q. What was the state of your general health when you went into the Sansome Street jail?

A. Well, I think it was all right.

Q. During the course of your stay there was

(Testimony of Nat Yanish.)

there any change or modification in the condition of your health?

A. Well, there were some indications of a change.

Q. Did you have some complaints about your health?

A. Yes, I had to go to the Marine Hospital. They took me out to the Marine Hospital in the prison van once to have my stomach examined.

Q. Did you get an examination out there?

A. I got a very cursory examination.

Q. Describe what occurred, please.

A. Well, I was brought into a doctor's office. He was a marine physician. I found out by the fact that he had his marine clothes hanging in view there. He was reading an Examiner [24] at his desk when I was brought in.

Q. You mean the newspaper?

A. Yes. He said, "What is your trouble?", without raising his eyes from the newspaper.

I advised him I had trouble with—I had a little ache in my stomach.

He said, "Take your shirt and coat off and I will examine you."

And so I did. I started to take it off. He came over just about the time I pulled my shirt off, dug a couple of fingers in my stomach, and said, "There is nothing wrong with you. You just have a nervous stomach," and prescribed some pills.

Q. Was that the extent of the examination?

Mr. Collett: If the Court please, I am going to object. There is no time fixed.

(Testimony of Nat Yanish.)

The Witness: It is on the record in the Immigration Department.

Mr. McMurray: Just a minute, Mr. Yanish. Just let me do all the arguing.

Mr. Collett: No foundation laid.

The Court: Overruled.

Mr. McMurray: Q. Was that the extent of the examination that you had. A. Yes. [25]

Q. During the course of your stay——

A. Excuse me. I would like to say something about the pills, if I may.

The Court: Q. About what?

A. About the pills that were given me. At the pharmacy the woman advised me not to take them unless I absolutely had to and said by all means never to take more than one because they were so potent that they might create me more difficulty than my original ache.

Q. Where was the pharmacy?

A. In the Marine Hospital.

Q. Did you take those pills?

A. No, I never took a pill, not after the admonition from the pharmacist.

Q. During the course of your stay there in the Sansome Street jail did you weight change in any way?

A. Yes, I lost quite a number of pounds.

Q. About how many pounds?

A. I think it was about twenty.

Q. During this incarceration you retained attorneys, did you not? A. Yes.

(Testimony of Nat Yanish.)

Q. You authorized those attorneys to take all steps necessary to secure your release, is that right?

A. That is right. [26]

Q. Without requiring you, that is, to post the bond which had been demanded of you?

A. That is right.

Q. Did you have conferences with your attorneys while you were in jail?

A. Very few.

Q. On those occasions where and under what circumstances did you have your conferences?

A. Well, not under the usual circumstances, at the Immigration Department. I was required to hold my conferences with my attorneys in a special little cubicle near Olson's office.

Q. Describe the cubicle.

A. It was a small room, a very small room, glass enclosed, I think it was.

Q. During your conferences with your attorneys was there any other persons than the attorneys and yourself present?

A. The first time, the first conference the guard sat down right with us, and when my attorney protested quite vehemently, the guard was finally ordered to sit outside of the room.

Q. He sat immediately outside of this glass enclosed cubicle, is that right?

A. Yes.

Q. Were you given all the time necessary to confer with your attorneys?

A. No. During one instance one of my attorneys was threatened [27] that he would be carried out bodily if he did not leave when Stan Olsen ordered

(Testimony of Nat Yanish.)

him to leave, although the attorney protested that he still had a few minutes more of consulting with me.

Mr. Collett: I will ask that that answer be stricken. If there was any conversation let him state the conversation.

The Court: I do not see how that is material, what the attorney was told.

Mr. McMurray: No, I do not think it is. The point I was interested in is that the conference was cut off.

Q. On that occasion had you completed your conference with the attorney?

A. No, that is right.

Q. Did you have other conversations with Mr. Olsen, Stan Olsen, after the first one which you have described, when you were admitted, taken into the jail?

A. There was one other discussion we had. I was ordered down to his office and was told that the attorneys were coming to see me and I was ushered into his office presumably to wait for the appearance of my attorneys, and for about five minutes before the appearance of my attorneys, or before I was informed that my attorneys had arrived, Mr. Olsen again broached the subject of me posting this new bond or the alternative of rotting there until I did. [28]

\* \* \* \* \*

Mr. McMurray: Q. During the course of your stay there did you have any visitors?

(Testimony of Nat Yanish.)

A. Yes.

Q. Are you married, Mr. Yanish?

A. Yes.

Q. Your wife is living? A. Yes.

Q. During that period of incarceration did she come to visit you? A. Yes.

Q. Under what circumstances did you see her?

A. We were ushered into a cage so that seeing—the term “seeing” is not an accurate description.

\* \* \* \* \* [29]

Mr. McMurray: Q. Will you describe this room or cage?

A. It is all steel mesh, wire mesh on three sides, from the floor up to the ceiling, and I suppose you could call it a room, but instead of lumber it was all wire mesh and it was so fine that you could hardly see your visitor. You would have to peer right up against the wire to see anyone.

Q. You would be on one side and the visitor on the other, is that right?

A. That is right.

Q. Could you touch, kiss, hug your wife, for example, when she came to see you?

A. No, it was impossible.

Q. Were you alone in there with Mrs. Yanish?

A. No. During regular visiting hours there would be as many as sixty or seventy in that small cage trying to talk. [30]

Q. About how long was the side of the cage on which the prisoners were?

A. I would say maybe 15 to 20 feet long.



(Testimony of Nat Yanish.)

Q. And about how wide?

A. And about 10 feet, approximately 10 feet wide.

Q. There was a corresponding portion on the other side of the wire mesh where the visitors were, was that right? A. That is right.

Q. You mean there might be as many as 60 people on one side of that mesh at one time?

A. There have been more. There have been more than 60 at times.

Q. Were you permitted to see your wife under any other circumstances down there?

A. No, not at any time.

Q. Did you have other visitors? A. Yes.

Q. Were your other visitors presented in the same way?

A. That is right, except my attorneys.

Q. Were you allowed these visitors on certain days of the week? A. That is right.

Q. Were visitors free to visit you only on those days? A. That is right.

Q. That is those were the only days on which you saw any [31] visitors?

A. That is right.

Q. When the time came for your release, when you were released from that jail, did you receive certain items which were given to you by Mr. Olson? A. Yes.

Q. What were those items?

A. Well, a number of—one was procedures of

(Testimony of Nat Yanish.)

the International Longshoremen and Warehousemen's Union Conference that he had withheld.

The Court: Q. A publication, you mean?

A. Yes, it was a publication of the procedures of the International Longshoremen and Warehousemen's Union Conference that he did not permit me to receive.

Mr. McMurray: Q. In general what was the nature of this material?

Mr. Collett: Objection on the ground of immateriality.

The Court: What is the materiality of what he got when he left there, counsel?

Mr. McMurray: Your Honor, I intend to show by these questions that during the time he was there his mail was interfered with and withheld from him, mail and other material sent to him or brought to him, and at the end of his incarceration he was given a tremendous bundle of mail, including publications of various sorts which had been addressed to him [32] and brought to him in the jail in the regular course of the United States mail, but which had not been delivered to him. It seems to me, your Honor, that that is one of the aspects of this incarceration which should be brought to the attention of the Court.

The Court: Q. You received when you left certain mail which had not been delivered to you while you were there, is that right?

A. That is right, a large pile of it.

Q. A large pile of mail?

(Testimony of Nat Yanish.)

A. Yes, including, for example a magazine that my wife purchased at 630 Sansome Street.

Q. How many pieces of mail would you estimate you received when you left?

A. It was a bundle wrapped up that was—I would say about 30 inches one way and about 18 inches in depth. It was full of letters and magazines and books and periodicals.

The Court: All right.

Mr. McMurray: Q. What is your occupation, Mr. Yanish?

A. I work for a newspaper, a labor newspaper here in San Francisco.

Q. Were you employed on that same newspaper at the time you were arrested and put in jail?

A. I was employed at the time, yes.

Q. What was the name of that newspaper? [33]

A. Daily People's World.

Q. Did you receive copies of that newspaper during your stay in the jail?

A. The first few days the paper came through and then it suddenly was terminated. Copies of the newspaper were included in the mail that was held up by Olson.

Q. When you wanted to write a letter while you were there was it possible for you to mail a letter?

A. Yes, provided I left it unsealed and left it in a box where the guards would seal the mail and then forward it. I paid the postage.

Q. You were instructed, were you, that no mail

(Testimony of Nat Yanish.)

was to be sent out unless it was deposited in this box and left unsealed?

A. That is right. [34]

\* \* \* \* \*

Mr. McMurray: Q. Mr. Yanish, as your attorneys in this case you employed the firm of Gladstein, Andersen and Leonard, is that correct?

A. That is right.

Q. From the time of the filing of the petition of habeas corpus you also employed the firm of Dreyfus and McTernan? A. Right.

Q. And for presentation of your case to Mr. Justice Douglas of the Supreme Court you employed the firm of Forer and Rein in Washington, D. C.? A. Right. [35]

\* \* \* \* \*

### Cross Examination

Mr. Collett: On the 16th of March were you in the office [36] of your attorney, Mr. Yanish?

A. Yes.

Q. Did he inform you that the deportation order had become final on that day?

A. That was not the subject of discussion.

Q. The question is were you informed?

A. I don't think so.

Q. I would like an answer.

A. I am quite certain we were not.

Q. You say that you were not informed on March 16th that the deportation order had become final?

The Court: Is that true or not?

(Testimony of Nat Yanish.)

A. I think that is true.

Q. What?

A. That I didn't know, I wasn't informed on the 16th.

Mr. Collett: Q. When were you informed?

A. To the best of my recollection I think I learned about it while I was in Sansome Street.

Q. When?

A. Possibly a week or two after that date.

\* \* \* \* \*

Mr. Collett: Q. What arrangements did you make thereafter [37] to leave the United States?

Mr. McMurray: I will object to that as irrelevant and immaterial? Not involved in this controversy at all.

The Court: I will permit the answer.

A. Under the requirements of the McCarran Act I filed a request with the Soviet Embassy to be admitted. [38]

\* \* \* \* \*

Mr. Collett: Q. When did you sign that document?

Mr. McMurray: It has been asked and answered, your Honor.

The Court: I think it has been, counsel.

Mr. Collett: In light of the answer, a document requesting something of the Soviet government, I would like the answer to that question: When that document was signed. [40]

The Court: Q. Can you give an answer to when that was signed?

(Testimony of Nat Yanish.)

A. I don't know the exact date. It was sometime during my incarceration at 630 Sansome Street, which would be between March 17th and May 27th. To the best of my recollection it was either the latter part of March or during April, but I just can't swear to it because time in there does not have the same meaning that it does out here. It does not make the same impression on you. [41]

\* \* \* \* \*

Mr. Collett: Q. With regard to the document pertaining to the Soviet Government, have you made a request to anyone at Immigration with regard to such documents?

Mr. McMurray: Object to it as incompetent and immaterial. [43]

\* \* \* \* \*

Mr. Collett: If the Court please, there was an objection made to the question. Is your Honor sustaining it?

The Court: I will sustain the objection.

\* \* \* \* \*

Q. You did not leave the United States from the time that [44] you knew the deportation was final and that you were to leave the United States, did you?

A. Would you restate that question?

The Court: Q. Have you been out of the country at any time since March 17, 1953?

A. No, I have not. This in answer to your question, sir. [45]

\* \* \* \* \*

(Testimony of Nat Yanish.)

Mr. Collett: Q. When you first went in what happened? Not generally, but what happened?

A. I was brought into a little office, I think it was on the fourteenth floor or thirteenth, one of those floors at which time, and within a minute or two, I was immediately let out again by the guards.

Q. Where did you go?

A. I was taken down one floor.

Q. To where?

A. To one of the offices. I think it was Mr. Olson's.

Q. Do you recognize Mr. Olson?

A. Yes, I do. He is sitting in the courtroom.

Q. Is there any doubt that it was Mr. Olson's office?

A. It is pretty definite. I am quite certain it was, yes.

Q. Was he there?

A. Yes, I am quite sure he was.

Q. Was anyone else there?

A. The guard—no, the guard was told to stay outside.

Q. Were you and Mr. Olson alone in the room?

A. To the best of my recollection we were.

Q. What was the conversation?

A. The conversation was to the effect that, "Are you going to post this new bond?"

I answered I had made my position clear. My position had been made clear by my attorney. [48]

The conversation continued on along that line for

(Testimony of Nat Yanish.)

about a minute or two, when an effort was made to get me to agree to post bond.

Mr. Collett: I object to that. I would like him to state the conversation.

The Witness: This is the conversation. You can't put quotes around it because I didn't take notes at the time. I am giving you the conversation to the best of my recollection. At which time I was told, "Well, you will rot in this place until you do."

Mr. Collett: Mr. Olson told you you would rot in the place? A. Yes.

Q. Was that the whole thing that was said, you will rot in this place until you post bail?

A. That is right.

Q. Was that all the conversation?

A. Then the guard was called in and told to take me upstairs again.

Q. You say you were thrown into one of the cells. What do you mean by "thrown"?

A. I was ordered in. I was led in. I was guided, directed.

Q. What did you mean when you told the Court you were thrown into the cell?

A. Exactly what I am saying. I was thrown in. I was not [49] physically or bodily thrown in, but I think counsel will understand the term "thrown." You probably have used it yourself. For example, it was probably meant in the same sense that Mr. Olson said to one of my attorneys that he would throw him out, and possibly Mr. Olson did not mean



(Testimony of Nat Yanish.)

he would bodily throw him out. I meant it in the same sense, I think, that Mr. Olson meant it.

Q. The actual fact is the door was open and you walked into the cell in a perfectly normal manner. Is that right? A. That is right.

Q. You call it a cell. That is the 50 ft. room. You would say about the size of this courtroom?

A. That is right.

Q. The door was opened in a normal manner and you walked into it?

A. The door was unlocked and I was then escorted in.

Q. Did you stay in that room for the entire time that you were there?

A. For the entire time with a few brief interludes, like chow, visitors, occasional library privilege.

Q. That was constantly your sleeping quarters?

A. That is right.

Q. You were not changed to any other room?

A. That is right.

Q. You slept every night in that room for the entire period [50] that you were there, is that right? A. That is right.

Q. How many double bunks were there in the room, do you recall?

A. To the best of my recollection there were around twenty four or something like that, twenty four double tiered, and I think there were around twelve on each side of the room.

Q. Was the room clean?

(Testimony of Nat Yanish.)

A. Yes, after a fashion.

Q. What do you mean by "after a fashion"?

A. Well, it wasn't as spotless as this courtroom, for example. [51]

\* \* \* \* \*

Mr. McMurray: Your Honor, I have just handed to counsel for his examination certain receipted bills bearing all, except in one instance, the stamp of the Clerk of the United States Court of Appeals for the Ninth Circuit, the "paid" stamp. I do not think it is necessary to put on any testimony to identify them.

Mr. Collett: I think there is, if the Court please. I would like to know who paid them. The bills speak for themselves as far as their being paid. Undoubtedly they were paid. But whether that is an element in this case, I am not going to stipulate that they be admitted in evidence other than to develop the fact that there were certain expenses, but whether it was any expense of this petitioner, you will have to prove it.

Mr. McMurray: Are you through now, counsel? I will offer as evidence in behalf of the plaintiff, the petitioner, your Honor, the following receipted bills on the billhead of the office of the Clerk of the United States Court of Appeals [56] San Francisco. These are uniformly addressed to Messrs. Gladstein, Andersen and Leonard, and they bear the name and number of the case, and each one bears a stamped notation "paid" with the date. The first is the bill for estimated expense of printing

record \$150. That was in action No. 13836, which is the contempt matter, your Honor.

The second is a similar bill for the habeas corpus matter, \$65.

The next is docket fee in the contempt matter, \$25.00.

The next, purporting to be a letter from Paul P. O'Brien, the Clerk, indicating that \$42.04 of the amount paid, the estimated expense of printing both these records, was returned. I have also two bills, receipted bills, for \$10 each for cost bonds on appeal. I will offer them also in evidence.

Mr. Collett: Objection, if the Court please. No foundation laid. Immaterial and irrelevant.

The Court: I think the objection will have to be sustained, counsel.

Mr. McMurray: I am afraid so. Then I have also a bill from the Pernau Walsh Printing Company, stamped "paid" and addressed to Gladstein, Andersen, and Leonard for appellant's opening brief, Yanish against Barber, \$191.43. I will offer that.

Mr. Collett: Same objection.

The Court: Same ruling. [57]

Mr. McMurray: Your Honor, as reluctant as I am to do it, I suppose I can take the stand and testify that this is a bill or receipted bill received by my law firm, which is in my file, or in the file of my law firm, in my custody. I think that will be sufficient identification to offer it. If counsel insists upon it, I will offer to take the stand.

The Court: I take it the position of counsel is

that although the bills were paid by somebody, there is no showing that they were paid by the petitioner.

Mr. McMurray: That may be.

The Court: Isn't that your position?

Mr. Collett: That is right.

Mr. McMurray: They were certainly paid by the petitioner's attorneys on his behalf, and that is the way these bills are ordinarily paid.

The Court: Did the petitioner ever pay them to you?

Mr. McMurray: I believe so, your Honor.

The Court: That is the point.

Mr. McMurray: I am not able to state. If he has not paid them, he certainly owes them, so I don't see——

The Court: Maybe he does not. Maybe somebody else paid it to you. Maybe he did not have anything to do with it at all, and if so, they would not be any element here which you could contend for.

Mr. McMurray: I take it from that the testimony which [58] I said I could give on this would not be acceptable.

The Court: It would not be any more helpful, unless you are able to say who paid them. If you are able to say that, of course——

Mr. McMurray: I can certainly say that the firm of Gladstein, Andersen, and Leonard paid this bill.

The Court: That still is not the point. Who paid Gladstein, Andersen, and Leonard for it? Did he pay them?

Mr. McMurray: I do not know the answer to that, your Honor. I do not know whether it has

been paid or whether it has not been paid and who paid it. It is my position that it is immaterial. I would make an offer of proof, then, your Honor, unless your Honor wants me to go through the formality of testifying—as I said I could a moment ago—and your Honor indicated you did not desire that testimony. I will offer to prove by such testimony as I outlined a moment ago by myself that this bill represents the——

The Court: Why don't you make your offer of proof that the firm of Gladstein, Andersen, and Leonard paid these various bills that you are talking about.

Mr. McMurray: I so offer to prove.

Mr. Collett: I object on the same grounds as before.

The Court: I would be inclined to think as a part in the link of proof they would be able to prove that.

Mr. Collett: But I think they would be able to prove it [59] but it still does not reach the essential element.

The Court: They can't put all their proof on at one time. I think they would be entitled to prove that their firm paid these various bills for briefs, and so forth. Now, whether the defendant paid them is another question. You can't do it all at one time.

Mr. Collett: That may be so, but they have to lay the foundation first before you get to this point.

The Court: I doubt it.

Mr. Collett: I make the objection.

The Court: Subject to your objection will you

stipulate that these bills were paid by the firm of Gladstein, Andersen, and Leonard in these cases indicated by counsel?

Mr. Collett: The receipts speak for themselves. I have no basis for saying they do or they do not. I take it on their face value that they were paid.

The Court: I am going to admit them for such value as they may have, counsel, showing they were paid by the firm of Gladstein, Andersen, and Leonard.

Mr. McMurray: Both the bills for the cost bond on appeal and the bill from Pernau Walsh for the printing.

Mr. Collett: Are you admitting all of them?

The Court: Yes, for such value.

Mr. Collett: Let the record show my objection goes to the entire proof. There is no foundation laid. [60]

(Bills referred to are thereupon received in evidence and marked Plaintiff's Exhibit 1.)

\* \* \* \* \* [61]

Mr. McMurray: Your Honor, I would ask leave to recall Mr. Yanish for one very brief bit of testimony. This is not in the manner of redirect examination, your Honor, but just to cover one matter which was omitted inadvertently on his direct testimony.

#### NAT YANISH

was recalled as witness, and having been previously duly sworn testified as follows:

#### Direct Examination—(Continued)

Q. (By Mr. McMurray): Mr. Yanish, you have

(Testimony of Nat Yanish.)

testified that you retained certain attorneys whom you named to effect your release from imprisonment. Do you recall your testimony on that this morning?      A. Yes.

Q. Have you paid those attorneys?      A. Not yet.

Q. Have you been presented with the bill by those attorneys?      A. Not yet.

Q. What arrangement did you have with those attorneys regarding the payment of their fees?

A. Well, my understanding was that the fee would be determined at the end of these hearings, and that I was given to understand that I would be able to get a return of my fees from Mr. Barber.

Mr. Collett: I ask that that be stricken, if the Court please, as purely hearsay, conclusion and opinion.

The Court: I think that last is a conclusion, counsel. "I was given to understand" may go out.

The Witness: I was told.

Mr. McMurray: Q. Your arrangements with your attorneys, the arrangements that you have just testified to, were made in a conversation between yourself and one of your attorneys, is that right?

A. That is right.

Q. At what time was that with relation to these events, do you recall?

Mr. Collett: I object, if the Court please. No foundation laid as to what conversation is being talked about now.

The Court: I think it has been covered. He said he has not received any bill from his attorneys.

(Testimony of Nat Yanish.)

Mr. McMurray: If it is clear, your Honor, I will leave it at that. That is all I have, unless counsel has some cross examination on that.

Mr. Collett: No.

Mr. McMurray: Your Honor, that is the petitioner's case. I should like at some time, perhaps after the respondent's case, to have an opportunity to discuss the services that were involved and to state to the Court what I think would be a reasonable fee for the services that were involved. [63]

The Court: Do you desire to do that now?

Mr. McMurray: I may as well. The services here involved included, first of all, the filing of the petition that Barber be held in contempt of court and argument of that in court, of course. It was when Mr. Yanish was jailed nevertheless; the filing of and the argument on the petition for habeas corpus and the appealing of both of those cases to the Court of Appeals. In the Court of Appeals there was argument.

Mr. Collett: If the Court please, do I understand that counsel is now testifying? Is he to be under oath or is he just making a statement?

The Court: It is a statement of what the attorney's fees consist of. I think he can do that without taking the stand, Mr. Collett, what services they rendered in connection with this matter.

Mr. McMurray: In the Court of Appeals, your Honor, in addition to arguing the main case, there was also a motion for bail pending appeal, which was argued there, and then a motion for bail pend-



ing appeal, which was presented to and argued before Mr. Justice Douglas, so that the services of the attorneys covered a great many months, numerous motions, one major brief, the briefing and argument of the motions on bail, and the motion of the respondent that the case be dismissed as moot in the Court of Appeals. All of this will be apparent, your Honor, from the records of the cases in those courts. [64] I think, your Honor, a modest fee for the services involved here, which dealt with some difficult questions of law, your Honor, would be \$7,500 that would be an adequate but modest fee.

Mr. Collett: Objection is made on the same grounds as was made with regard to the other bill that your Honor admitted in evidence, subject to objection.

The Court: Proceed. \* \* \* \* \*

### BRUCE G. BARBER

was called as a witness on behalf of the defendant, being first duly sworn testified as follows:

#### Direct Examination

By the Clerk: Q. Will you state your name for the record? A. Bruce G. Barber.

Q. (By Mr. Collett): What is your official capacity, Mr. Barber?

A. District Director of the Immigration and Naturalization Service for the San Francisco District.

Q. Are you present District Director?

(Testimony of Bruce G. Barber.)

A. I am, sir.

Q. In January, 1953 were you the District Director?  
A. Yes, sir. [65]

Q. And ever since from 1953 to the present time?

A. That is correct.

Q. How long have you been District Director?

A. Since 1950, I believe, November 1950.

Q. Are you familiar with the case of Nat Yanish?  
A. In a general way I am, yes.

Q. You knew the proceedings that occurred with regard to raising the bond and the imposition of conditions in that bond which were presented to Judge Lemmon by way of a petition for an injunction?

A. Yes. I will have to answer again, though, it was in a general way. I did not know the specific details.

Q. In January and February 1953 you knew that an injunction had been issued in the action?

A. Yes.

Q. This action by Judge Lemmon pursuant to the conditions of a bond?  
A. Yes.

Q. And that was under the law as it existed, was it not, prior to the enactment and the effective date of the McCarran Act on December 24, 1952?

A. Yes.

Q. The McCarran Act became effective on December 24, 1952?  
A. Yes.

Q. That is known as Public Law 414? [66]

A. Yes.

Q. Subsequent to the effective date of the Mc-

(Testimony of Bruce G. Barber.)

Carran Act did you receive any directive or instructions from the Attorney General with regard to subversive cases that were released under delivery bonds prior to the effective date of Public Law 414?

A. Yes, we did.

Mr. McMurray: Objected to, your Honor. Even if he had obtained instructions, and even if those instructions were the cause or immediate reason for his acting, that in no way excuses the act on which he has been found in contempt of court.

The Court: The objection is overruled.

Mr. Collett: Will you stipulate he received such instructions in January 1953?

Mr. McMurray: I have no knowledge on the subject. If he testifies it, I am sure that he did.

Mr. Collett: Q. Did you receive instructions under the authority of the Attorney General of the United States with regard to the subversive cases I just mentioned? A. Yes, I did.

Mr. McMurray: Your Honor, I am going to object to that because of the form, when he says "under the authority of the Attorney General." That calls for a conclusion and opinion. I think if he received instructions from the Attorney General he can say so, but when it is put this way, we are getting his interpretation of the authority under which his instructions [67] were received.

The Court: I would think this is a preliminary question. If the answer is yes, I expect you to go in and show what they were.

Mr. Collett: Yes.

(Testimony of Bruce G. Barber.)

Q. Did you answer the question?

A. Yes.

Mr. Collett: Will you mark this for identification?

(A document was marked respondent's Exhibit A for identification.)

Mr. Collett: I will show you respondent's Exhibit A. Can you identify that document?

A. Yes, I can. That is the instruction I received from our head office in Washington.

Q. From whom was that instruction received?

A. That was received from the Commissioner of the Immigration and Naturalization Service stationed in Washington.

Q. Do you recall when you received the document? A. It was shortly after January 14th.

Q. Was it in accordance with this directive that you proceeded to consider the case of Nat Yanish as regards the bond upon which he was then released?

A. Yes, that is correct; except that there was a court proceeding pending, and we did have an officer of our service talk to the Assistant U.S. Attorney, or the U.S. Attorney's Office, [68] as to what our actions should be with respect to the new law and the proceeding.

Q. Was that at your express direction that consultation was had with the Office of the United States Attorney? A. Yes, it was.

Q. Where? In San Francisco?

A. In San Francisco.

Q. With regard to what?

(Testimony of Bruce G. Barber.)

A. Whether we were at liberty to go ahead under that directive in view of the court proceeding. As I recall it, there had been a judgment entered at that time, and the discussion involved whether we should go ahead or whether we should have some further action taken on it, and our instructions from the United States Attorney's Office was in view of the order of the court dismissing the other action, as I recall it, and in view of the change of the law it would be proper for us to proceed.

Q. What happened thereafter?

A. I received a call thereafter, I think—and my recollection is a little bit hazy, but the record will show what took place I think. We had to serve the notice on the alien to post a new bond with certain conditions in the bond that had not previously been required in a bond in our understanding of the law. I had some conversation relating to this matter with present counsel, Mr. McMurray. He said that he would have [69] the alien in his office, and that we could there apprehend the alien. I can't remember now just why he did not bring the alien to the office. He did notify me, however, in substance that they would not sign the bond. They were contesting it and wanted to test its legality.

The Court: Mr. Collett, nothing has been offered yet in evidence.

Mr. Collett: I will offer it in evidence at this time.

Mr. McMurray: Objected to, your Honor, on the

(Testimony of Bruce G. Barber.)

ground that it is incompetent, irrelevant and immaterial.

The Court: The objection may be overruled. It may be admitted. May I see it? Go ahead.

Mr. Collett: Q. The conversation you mentioned in regard to Mr. McMurray—when was that? What date, do you recall?

A. I don't recall the specific date, but it was in connection with the posting of a new bond and would have been just preliminary to the time that Mr. Yanish was turned over to our custody.

Q. You knew that a proceeding was instituted in this court with regard to contempt as to the endeavor to impose conditions upon the communications that had occurred prior to March 16th?

A. I am not sure, Mr. Collett, that I clearly understand your question.

Q. Did you know that on March 16th there was a proceeding instituted in this court? [70]

A. I knew that there was a proceeding instituted in the court. I am not sure of the dates.

Q. You knew that that proceeding was concerned with the question of contempt or injunction?

A. Yes.

Q. As to the imposition of any conditions under Public Law 414? A. Yes.

Q. Was any action taken with regard to the detention of Mr. Yanish prior to the ruling of this court, Judge Murphy, in that proceeding?

A. It is my recollection that no action was taken until after the ruling by the court.

(Testimony of Bruce G. Barber.)

Q. It was after the court had dismissed that petition that the detention of the petitioner herein, Mr. Yanish, was sought and obtained, is that correct? A. Yes.

Q. In the meantime, did you know that his status had changed from one who was not subject to deportation, because of the absence of a final order, to one subject to deportation because of the existence of a final order? A. Oh yes, yes.

Q. That occurred when? Do you know of your own knowledge?

A. That occurred prior to the time that he was taken into custody. In other words we had a warrant of arrest, which was [71] issued for the purpose of according the alien a hearing to show cause why he should not be deported, and the warrant of deportation is issued directing his deportation from the United States.

Q. That final order of deportation had been entered prior to March 16th, 1952?

A. That is correct.

Q. You are familiar, are you not, with the conditions and the operation of the Immigration and Naturalization orders at 630 Sansome Street?

A. Yes, I am.

Q. Do you personally supervise the various matters pertaining to quarters, food, and the well being of all the prisoners who are detained?

A. I do not personally supervise it. I have general supervision. We do have a steward in charge of the culinary work, preparing the meals, and then

(Testimony of Bruce G. Barber.)

over him is our officer who is in charge of the guards, and over above him is Mr. Stanley Olson. I go into the detention quarters, not at regular times. I have gone in many times at night, on the weekend—there is no set time when I go through them. I have also taken people through. I took the Commonwealth Club through the quarters not too long ago.

Q. There are standard procedures with regard to inspection, cleanliness, and the establishment of proper menus for food and conditions under which the detainees eat and are served food, [72] is that right?

A. Yes, that is correct. There is a menu prepared and those menus are forwarded to our central office, and they must meet certain standards as to calories, so forth. Also the meals and the purchasing of goods to prepare the meals are very carefully allotted. For instance, with Chinese we have to buy a certain kind of rice. We have certain races in the detention quarters that can't eat pork. So we purchase our food to meet the requirements of the people we may have in the detention facility.

Q. Do you know who it was in the United States Attorney's Office whom you consulted with regard to the effectiveness of Public Law 414?

A. I personally do not. I believe, however, that Mort Lavine, who is one of our officers, consulted with Bonsall. I believe Mr. Bonsall was then the deputy in charge of our work.

Q. It was after the consultation that the decision was made to proceed, to impose conditions of bond,



(Testimony of Bruce G. Barber.)

and the letter of communication was sent to Mr. Yanish with respect thereto?

A. That is correct.

Mr. Collett: That is all.

If the the Court please, one matter I would like to call to your Honor's attention, which is in the transcript of the appeal. There is a stipulation which was entered into for whatever value it may have. It was in the habeas corpus appeal and is dated April 6th, after the return to the order to show cause [73] had been filed on March 20th. That is on page 15 and 16 of the transcript in No. 13785, in the Court of Appeals, and that is No. 32630 in this court;

"It is hereby stipulated by and between the parties and by their respective counsel that (1) it is a fact that on March 11, 1953, the Board of Immigration Appeals made its order confirming the order of the Assistant Commissioner dated May 7, 1952 directing the deportation of Nat Yanish from the United States and (2) That in the light of the foregoing the allegations of paragraph III of the respondent's return to the order to show cause herein may be deemed to read,

" 'denies the allegations of paragraph III and firmly asserts the petitioner is lawfully detained pursuant to authority contained in Section 242 (a) and 242 (c) of Public Law 414'."

That was signed by all counsel for the petitioner and the United States Attorney.

(Testimony of Bruce G. Barber.)

Cross Examination

Mr. McMurray: Q. Mr. Barber, do you recall the occasion when Mr. Yanish was arrested by your officers in March of 1953? A. Yes.

Q. That occurred immediately after your telephone conversation or one of your telephone conversations with me, did it not?

A. I think we had some conversation the day before the apprehension took place. [74]

Q. On that occasion, on the occasion of the telephone conversation, you were told by me that Mr. Yanish would be in my office but that he would not surrender. If you wanted to arrest him you would find him there.

A. I think that is correct.

Q. Mr. Barber, when did you receive notice that the deportation order had become final?

A. I don't remember the specific date.

Q. When you received it did you communicate to your attorneys?

A. I don't remember the specific procedure. I will have to testify as to what we generally do. Where there is a court action pending, the matter would be cleared by whatever officer would ordinarily handle the deportation matter before any action is taken with our attorneys who represented us before the courts, or the United States Attorney's Office, I should say.

Q. When you have a matter in which there is some court action pending and additional material pertaining to that man, the person involved there,

(Testimony of Bruce G. Barber.)

is received from the Immigration Service in Washington, don't you have that forwarded—isn't it standard procedure to have that forwarded to the attorney who is representing you or the Service in court?

A. Are you referring to the instruction here that we got specifically?

Q. No, I am referring to the standard procedure, if there is [75] one, that you follow when you have an action pending in court regarding somebody whom you are seeking to deport——

A. Yes.

Q. And some further material bearing on his case is received from your Washington headquarters isn't it your standard practice to have that material referred to your attorneys?

A. Anything that would be in the nature of an instruction goes to all employees concerned, and anything that bore on a case they were handling under normal procedure would be referred to them.

Q. That is referred by them, you mean by your attorneys?

A. Yes, or to, because he was concerned with it. Most of our instructions have general distribution and some of them have special distribution.

Q. When you received notice that the order of deportation in Mr. Yanish's case had become final was that communicated to your attorneys?

A. That would be first ordinarily, and then I do not know what was done in this case, but that would be indicated to Mr. Stan Olson, who is in charge

(Testimony of Bruce G. Barber.)

of the deportation and detention, and then if there was any matter in the file indicating an action before the court, he would then contact our attorneys.

Q. Do you know when you became aware that the deportation order had become final? [76]

A. No specifically.

Q. When you received the word that the deportation order had become final what action, if any, did you take to notify Mr. Yanish or his attorneys that you consider there had been a change in his status?

A. I am not just sure, but in view of that instruction there was a little change in our procedure.

Q. By that instruction are referring to respondent's Exhibit A, the instruction that dated January 14, 1953?

A. Yes, I am. If you will notice, that instruction requires us to give notice to the alien that he is required to come in and post a new bond, including in the bond the provisions that are referred to therein.

Q. After you had received notice that the deportation order in Mr. Yanish's case had become final, what steps did you take, if any, to notify him that he now occupied a different status than he had before? A. I don't know specifically.

Q. Did you receive any other instructions, Mr. Barber, upon which you acted in requiring Mr. Yanish to post a bond, any other instructions than respondent's Exhibit A.

A. These are the instructions on which I acted.

(Testimony of Bruce G. Barber.)

Q. And no others?

A. There are other instructions as to procedural matters that are not contained in the regulations or not contained in [77-78] these instructions of this kind, but they are mere information for our officers, which is a procedural thing as to how we would accomplish certain things. They generally are confidential instructions.

Q. In other words this was the only instruction or authority upon which you relied for, first of all, requiring the posting of a new bond and, second, for requiring or ordering Mr. Yanish's imprisonment, is that right?

A. That would be essentially right, but, of course, you could not say we ignored the law. This is based upon the statute and the regulations under the law. This is our directive to act, and this instruction is based, at least we believe it is based on the law and the regulations.

Q. When you received this respondent's Exhibit A, this instruction, did you prepare or have prepared a list of cases to which you thought it applicable?

A. We have the men who are handling these cases directed to go ahead and carry it out and they themselves would have to get the cases together. They may be in different stages of progress. Some of them may have been in subversive units under investigation. Some of them may have been in the detention and deportation unit and it would be necessary of course, to get the file together to see what

(Testimony of Bruce G. Barber.)

the status of it was. You will notice in the last paragraph they specifically say that is not to apply to cases in which there is a great—where the alien [79] has been released on court bond. So there had to be a review of each file and each individual case.

Q. At that time, Mr. Barber, did you make the decision or was the decision made in Washington about which cases the instruction applied to?

A. Well, instruction is a general standard we would all be guided by all over the country. You will notice there they mention a number of cases, all of which cases, were not in this district.

Q. Did you make the decision which case this was to be applied to or was that decision made in Washington or elsewhere?

A. That is a difficult question to answer because Washington laid down the standards. We were only to determine whether or not a particular case came within that standard.

Q. You did make that latter determination, did you?

A. Yes.

Q. Did you consult with Washington about it before making it? That is, in the case of Mr. Yanish?

A. I can't recall that there was any conversation concerning it.

Q. Did you request information from Washington or from the United States Attorney here before you took the first step in applying this to Mr. Yanish?

A. Well, I think you ought to be more specific.

(Testimony of Bruce G. Barber.)

You would help me, at least, in giving you an answer as to what step you [80] may mean. There were numerous steps necessary to be taken. We had to read the instruction and try to analyze the instruction, and then we had to decide just how big a job it was going to be. We had a number of these cases. Yanish was only one of many.

Q. Before you first applied it to Mr. Yanish by requiring of him that he appear and post a bond, did you ask instruction or advice from Washington?

A. I can't recall that I did. I took it that this was my instruction, the exhibit that you have there.

Q. You did not ask for any particular instruction with regard to Yanish?

A. I can't recall of any.

Q. Did you request any advice from the United States Attorney here with regard to the propriety of proceeding or applying this directive to Yanish before you took the first step against him?

A. It is my recollection that we did and I have so testified. [81]

\* \* \* \* \*

Mr. McMurray: Q. Did you at any time seek the advice or direction of the Immigration Service on the application of this instruction, Respondent's Exhibit A, to a case in which you personally had been ordered by a district court not to do the thing that this directive told you to do?

Mr. Collett: I will object on the grounds of obscurity as to what the Immigration Service is and what is meant by the Immigration Service.

(Testimony of Bruce G. Barber.)

The Court: You mean the Commissioner of Immigration in Washington?

Mr. McMurray: Yes. May I modify my question to specify the Commissioner of Immigration?

A. I do not recall specifically discussing this particular case. I have discussed that instruction on numerous occasions [85] with the central office. My conversation probably would not have been with the Commissioner but would have been with Mr. Davaney, who would be the man I would normally talk with about the interpretation of an instruction.

Q. Did you have any such consultation with Mr. Davaney?

A. I have testified before, and I can't now, I simply can't clear up in my mind as to whether I did or not in this specific case.

Q. After your oral statement to me or to somebody in our office that Mr. Yanish would be required to surrender unless he posted a new bond, do you recall that the existence of this injunction was pointed out to you when you said that you would nevertheless go ahead? Do you recall that?

A. Counsel, I never made any such statement and I would not make such a statement. I have always listened to the court. The court is the one that gives us the interpretation of these laws.

Q. Is it your testimony that when you applied this instruction to Mr. Yanish you did not know of the existence of the injunction granted by Judge Lemmon?



(Testimony of Bruce G. Barber.)

Mr. Collett: Objection, if the Court please. He can ask the questions directly.

The Court: He may answer that question.

The Witness: I think I testified, counsel——

The Court: Just answer yes or no. [86]

(The question read.)

Mr. Collett: He has testified already several times that he did.

The Court: Just answer.

The Witness: I am a little——

The Court: Read the question again.

(Question reread.)

A. No, that is not my testimony. [87]

\* \* \* \* \*

Q. At the time that this oral and this written demand were made, you knew that the injunction granted by Judge Lemmon against you prohibited your demanding any such bond, did you not?

A. That is not my recollection.

Q. I take it you did not before making the demand read the injunction?

A. Well, I can't recall whether I specifically read the injunction. I think I did. At least our representatives read it for me and informed me about it.

Q. And you therefore interpreted that injunction as not prohibiting nor demanding a bond different from the one that was then in effect except as to the face amount, did you?

A. No, I did not. I did not so testify. What I testified to was that I understood there was noth-

(Testimony of Bruce G. Barber.)

ing pending in the court to prevent us going ahead with the instruction that we had from our central office at the time Nat Yanish was taken into custody.

Q. Mr. Barber, I will say again, my questions are directed toward the time that you demanded that Yanish post a new bond.

A. In order to answer that I would have to see the file and see when we made the demand. I can't recall whether we sent it out by letter or whether it was an oral conversation with you. [89]

Q. At any rate the fact is undisputed apparently, is it, Mr. Barber, that at the time that you made the demand upon Yanish that he post a new bond, you did not know that Judge Lemmon's injunction prohibited that? A. No.

Mr. Collett: I object to that question, if the Court please, as being argumentative, and it is hearsay and calls for a conclusion as to what the legal effect one way or the other as a matter of prohibition.

The Court: I think he can answer it if he understands the question.

The Witness: No, I did not.

Mr. McMurray: That is all.

### Redirect Examination

Mr. Collett: Q. Who handled most of the affairs with regard to the class of individuals concerned with the directive Exhibit A in your office.

(Testimony of Bruce G. Barber.)

A. I believe Mr. Stan Olson would have handled the majority of those details.

Q. Did he also handle the matter of Mr. Yanish, the petitioner here, the detail?

A. No, I am thinking of two things; one, the administrative procedure and the other the court procedure. Of course, the court procedure would be handled by whoever was the then acting law officer with the United States Attorney's Office, but the administrative matter would have been handled by Mr. Olson, but [90] these two gentlemen coordinate their work. They must.

Q. With regard to the notice and the taking into detention, the notice to post bond with conditions and taking him into detention, you have testified that at the time he was taken into detention it is your recollection that there were no legal proceedings to prevent it?

A. Yes, that is correct. [91]

\* \* \* \* \*

Q. In other words, you were satisfied at the time that Mr. Yanish was taken into detention that there was no proceedings then pending which would prevent or interfere with your taking him in into detention, is that right?

A. That is correct.

Mr. Collett: That is all.

Mr. McMurray: Just one question.

Q. Mr. Barber, are you an attorney?

A. I have an L.L.B. degree.

(Testimony of Bruce G. Barber.)

The Court: What do you mean by that? Have you been admitted to practice?

A. No, I have not, your Honor.

Mr. McMurray: No further questions.

The Court: Mr. Barber, have you read the decision in this [92] matter, Yanish vs. Barber, the Circuit Court of Appeals decision?

A. I think I did at the time it came down, your Honor.

Q. It came down a couple of months ago, in March of this year. Did you read it then?

A. I am quite sure I did. I try to read all of these decisions. I take them home in my briefcase, and if I have time, I read them.

Q. Do you recall this language in the opinion of the circuit court which states, "We feel constrained to observe that the appropriate procedure for appellant—" that would be you—"to pursue as a public officer would have been to move for a modification or a vacation of the injunction. It was not for him any more than it would be for a private individual in like circumstances to decide that an injunction order running against him had been rendered nugatory by subsequent legislation. His course should be to obey it unless and until set aside in proceedings brought for that purpose." Do you recall that language?

A. Yes, your Honor. I am sorry I did not remember it before, but I have been working on this Wetback thing day and night for the last few years.

(Testimony of Bruce G. Barber.)

I did not recall it until you read it to me. I not only read it but I studied it.

Q. You understand that that is the law in reference to a situation of this kind, do you not?

A. I certainly do. [93]

The Court: That is all.

\* \* \* \* \*

### STAN OLSON

was called as witness on behalf of the respondent and being first duly sworn testified as follows:

The Witness: If the Court will excuse me, I have a cold and I may be coughing here.

The Clerk: Q. Will you state your name for the record?

A. Stan Olson.

### Direct Examination

Mr. Collett: Q. What is your official capacity?

The Court: If there are some brief matters you may want to go into, Mr. Collett, you may do so. I do not know that you have to go into the entire conduct of the jail.

Mr. Collett: No, I am not going into the conduct of the jail, just introductory matter pertaining to and supplementing what Mr. Barber has testified.

Q. What is your official capacity?

A. I am the chief of the detention, deportation and parole section. [94]

Q. Of what?

(Testimony of Stan Olson.)

A. Of the Immigration and Naturalization Service of San Francisco.

Q. That is your present occupation. How long have you been in such capacity?

A. For approximately 18 months.

Q. In all of 1953 did you serve in that capacity?      A. Yes, sir.

Q. During the months of February and March 1953?      A. Yes, sir.

Q. Are you familiar with the case of Nat Yanish and the Immigration files and the records?

A. Yes, sir.

Q. Do you have any recollection of March 17, 1953, when Mr. Yanish was taken into detention?

A. Yes, sir.

Q. Did he come to your office at that time?

A. Yes, sir.

Q. Did you have a conversation?

A. I believe so.

Q. Who was present?

A. To the best of my recollection now there was either one or two of the investigators that had taken Mr. Yanish into custody, and I believe that Attorney Brodsky was there, although I am not sure on that point. [95]

Q. Did you have any conversation with Mr. Yanish?      A. Yes.

Q. Will you state it to the best of your recollection?

A. At that time we had prepared a new bond containing certain conditions pertaining to his asso-

(Testimony of Stan Olson.)

ciates, traveling, and so forth, and when the investigators brought him to my office he was asked—informed of the conditions and asked if he would sign the conditions pertaining to his release; that there was some conversation, I think then that he would not, and he was then taken into the detention quarters. It was very brief, to the best of my recollection, probably not more than two or three minutes.

Q. Did you at that time or any other time tell him that he would rot in that place until he posted bail?      A. No, sir.

Q. Do you have any knowledge or recollection of the events preceding March 17 with regard to notice that may have been sent to Mr. Yanish?

A. Yes, sir.

Q. What is your recollection of the first notice that may have been sent?

A. I would like to explain just a little bit. Over a period of the last six years, I think, I have had, in one capacity or another, dealings in this particular case. So sometimes the events would kind of intermingle. However, I try to remember [96] each condition as it comes up. I am trying to the best of my recollection to remember only those particular incidents that occurred in March 1953. Now, what was the question?

Q. Well, I will withdraw the question with that statement. Did you know that there was an injunction issued by Judge Lemmon with regard to the imposition of conditions on bond?

(Testimony of Stan Olson.)

A. May I explain a little bit? There have been so many court actions taken that I was not sure what was there, but I knew there was some court action keeping us from proceeding with his deportation.

Q. Was there any consultation instituted by you with the United States Attorney or any other superior of yours with regard to imposing conditions in the bond?      A. Yes, sir.

Q. What is your knowledge on that?

A. I called Mr. Lavine before any action was taken with respect to requiring him to appear at our office to post a new bond. I knew that Mr. Lavine was familiar with the pending court proceedings at that time, and that was taken—I don't know—quite some time—just how long before we called him in I don't recall, but it was a few days, a couple of weeks, and so forth.

Q. Was that prior to any notice of any kind, either oral or written to Mr. Yanish?

A. Yes, sir, because I had received this directive from our [97] central office, and it is part of my function to carry an order out.

Q. What are you referring to?

A. Exhibit A. We have several cases, subversive cases, that are pending that fall within that instruction there. The Yanish case is only one of them, and when it came up to the time of determining what action should be taken in the Yanish case under that directive, I did talk with Mort



(Testimony of Stan Olson.)

Lavine pursuant to the pending court action at that time.

Q. Was it your understanding——

Mr. McMurray: I will object to leading questions here. I think you can ask him what his understanding was.

The Court: I think it is leading, counsel. Endeavor to avoid that.

Mr. Collett: I do not want to resort to any leading questions. The question I have in mind was not leading. That was only leading to the question.

Q. Were the notices that were sent to Mr. Yanish initiated by yourself?           A. Yes, sir.

Q. Do you recall when the first notice was sent?

A. It was, I would estimate, probably 10 days, two weeks, something—three weeks maybe—before he was finally taken into custody.

Q. Was it oral or written? [98]

A. To the best of my recollection the first notice was a written notice, sent registered mail to both Yanish and counsel.

Q. Was the consultation with the United States Attorney's Office regarding the propriety of that notice before the notice was sent or after?

A. Before.

Q. It was before it was sent. How long before, do you know?

A. No, Mr. Collett, because we had so many cases that were pending right at that time that just exactly when we took up the Yanish case I do not recall.

(Testimony of Stan Olson.)

Q. Do you know when you received notice of the entry of the final notice of deportation?

A. Yes, sir.

Q. When was that?

A. I received it by wire from our central office on March 11.

Mr. Collett: That is all.

### Cross Examination

Mr. McMurray: Q. Do you have a clear recollection, Mr. Olson, now that you discussed the question of requiring a new bond with Mr. Lavine before you sent out any notice to him?

A. There was no question of it in my mind, because of the instruction that we had received from our central office I had to take some action on those types of cases, and before I took any action on Yanish's case, I discussed not once but I believe several times with Mort Lavine, not only here, by telephone, [99] but in my own office.

Q. Do you recall that there was some court proceeding pending which prevented you from carrying out the deportation?

A. I wanted to find out whether I could proceed in the Yanish case under that directive without interfering with any court action that might then be pending.

Q. You understood that there was something pending at that time?

A. I did not know what was pending, that is the reason I talked with Mr. Lavine about it.

(Testimony of Stan Olson.)

Q. You asked him if there was something pending?      A. Yes.

Q. What did he say?

A. I don't recall just what—what I asked him was whether or not we could now proceed under this directive, that there was no impediment by any court in permitting us to proceed, and the ultimate answer was yes, we could proceed. [100]

\* \* \* \* \*

[Endorsed]: Filed November 8, 1954.

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[Endorsed]: No. 14518. United States Court of Appeals for the Ninth Circuit. Nat Yanish, Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: September 17, 1954.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14518

NAT YANISH,

Appellant,

vs.

BRUCE G. BARBER, etc.,

Appellee.

STATEMENT OF POINTS TO BE RELIED  
UPON ON APPEAL

On the within appeal, appellant herein will rely upon the following point:

The Court erred in holding that although the respondent was in contempt of court, no fine should be levied against him nor other redress given appellant as the victim of respondent's contemptuous acts.

Dated: November 3, 1954.

GLADSTEIN, ANDERSEN,  
LEONARD & SIBBETT,  
BENJAMIN DREYFUS,  
FRANCIS T. McTERNAN,

/s/ By LLOYD E. McMURRAY,  
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed November 5, 1954. Paul P.  
O'Brien, Clerk.

No. 14,518

United States Court of Appeals  
For the Ninth Circuit

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NAT YANISH,

*Appellant,*

VS.

BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
Service,

*Appellee.*

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APPELLANT'S OPENING BRIEF.

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FILED

MAY 12 1955

PAUL P. O'BRIEN, CLERK



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# United States Court of Appeals For the Ninth Circuit

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NAT YANISH,

*Appellant,*

vs.

BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
Service,

*Appellee.*

## APPELLANT'S OPENING BRIEF.

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This is an appeal (R. 8) from an order of the Court below which, while holding appellee in contempt of a prior order directing him not to impose additional conditions in a bond which had been posted by appellant, nonetheless directed that no sanctions be imposed against appellee and that no reparation be awarded appellant (R. 4-5). And this, despite the fact that as a result of appellee's contempt, appellant was forced to spend two and one-half months illegally in jail and was compelled to maintain litigation up to and including Mr. Justice Douglas to procure his release on bail.

## JURISDICTION.

The jurisdiction of the Court below is based upon § 10 (c) of the Administrative Procedure Act (5 USCA 1009); 8 USCA [1946 Ed.] 164, now 8 USCA 1329; 28 USCA 1331; and 18 USCA 401 and 402). The jurisdiction of this Court is based upon 28 USCA 1291, 1292.

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## STATEMENT OF THE CASE.

This is not the first time that Yanish has had to come to Court to obtain relief from the unlawful acts of over-zealous administrators. His last appearance before this Court resulted in an opinion (*Yanish v. Barber*, 211 F.2d 467 [CA 9]) which sets the stage for this appeal.<sup>1</sup>

In that opinion Judge Healy recites the relevant background facts which may be briefly summarized as follows:

Yanish lawfully entered the United States approximately forty years ago when he was a child of seven. He has resided here continuously ever since. In 1946 he was arrested on a deportation warrant which charged him with membership in a subversive organization. He was released upon bond conditioned according to law that he be produced when required. For some three years, during which time he complied

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<sup>1</sup>For other facets of Yanish's resistance to the efforts of administrative officers to deprive him of or to limit his liberty in a manner contrary to constitutional prohibitions, see Mr. Justice Douglas' opinion in chambers (*Yanish v. Barber*, 97 L.ed. 1637); and the injunction issued by Judge Lemmon (*Yanish v. Barber* [D.C. N.D., Calif., No. 29013]).

scrupulously with the terms of the bond, this remained his status. In 1949 appellee's predecessor sought to revise the conditions of the bond by requiring Yanish to make periodic visits to the Immigration Service. Yanish challenged the right of the Service to impose such a condition on his bond and on July 28, 1950, Judge Lemmon issued an injunction permanently restraining appellee "from requiring the petitioner [Yanish] to revise or amend the said bail bond . . ." (211 F.2d at 468).

Two and one-half years went by during which time Yanish continued to comply scrupulously with the conditions of his bond without incident. Then in March of 1953 and despite the existence of the permanent injunction of Judge Lemmon, appellee demanded of Yanish that he execute a new bond with different and more onerous conditions than were previously required of him. Upon his failure to do so, Yanish was summarily arrested, held in custody, and deprived of his liberty until he was ordered released on bail by Mr. Justice Douglas in May of 1953.

Just before his arrest Yanish had sought to obtain an order from the Court below holding appellee in contempt of Judge Lemmon's order for demanding the revision of the bond, but the Court declined even to issue an order to show cause and summarily dismissed Yanish's complaint. This Court, in the opinion already cited, held that in this the Court below was in error (211 F.2d 467, 468) and that the appropriate procedure for appellee to have followed would have been to move for a modification of Judge Lem-

mon's order. This Court observed that so long as that order was in effect, "his [appellee's] course should be to obey it" (*ibid.*, at 470). Accordingly it reversed the judgment of dismissal and remanded the cause with directions to the Court below to issue an order to show cause.

Upon the remand the Court below (Judge Hamlin) found appellee in "technical" contempt of Judge Lemmon's order (R. 4) but refused to impose any sanctions upon appellee or to award any reparation to appellant (R. 5).

This appeal is from the refusal to impose sanctions and award reparation. No appeal was taken by appellee from the finding that by imprisoning appellant he was in contempt of Judge Lemmon's order.

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### **SPECIFICATION OF ERRORS.**

The Court below erred in refusing to impose sanctions upon appellee or to award reparation to appellant.

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### **ARGUMENT.**

This appeal presents only one very simple question and it has nothing to do with internal security, or the views of appellant, or the government's program to deport subversive aliens, or any such matters. The question is this: When a respondent is found in contempt of a Court order and when the record shows that the petitioner has suffered damages as a result of

that contempt, may a trial Court refuse to impose sanctions on respondent or award reparations to petitioner?

As we have pointed out, the Court below did find appellee in contempt of Judge Lemmon's order and from that finding appellee did not appeal, so there is no question here but that appellee was so in contempt.<sup>2</sup> The sole question thus presented is whether under such circumstances and in the face of an undisputed record that as a result of that contempt appellant was incarcerated for two and one-half months and was required to litigate his right to release up to and including a Justice of the Supreme Court, the Court below erred in refusing him reparation for the losses he suffered. In this regard it must be noted that the Court below refused to award appellant any reparation whatsoever, so that we are not here concerned with the question of an exercise of discretion in fixing the amount to be allowed. The total absence of *any* award raises the question on this appeal.

The simple question thus presented has a most simple answer: The Court below was in palpable error, for it is elementary that

“If complainant makes a showing that respondent has disobeyed a decree in complainant's favor and that damages have resulted to complainant thereby, complainant is entitled *as of right* to an order in civil contempt *imposing a compensatory*

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<sup>2</sup>Indeed, it is probable that this Court's opinion in *Yanish v. Barber*, 211 F.2d 467, constitutes the “law of the case” on this point. But we need not concern ourselves with this since no appeal has been taken from Judge Hamlin's finding that appellee was in contempt.

*fine.*” (*Parker v. United States*, 153 F.2d 66, 70 [CA 1]).

This rule is of universal application and so far as we know has never been questioned. Indeed, so basic is it that few cases have bothered to enunciate it.<sup>3</sup> The cases generally turn upon a consideration of the elements of damage which properly make up the compensation to be awarded (*United States v. United Mine Workers*, 330 U.S. 258, 303-304; *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 443-4; *Judelshon v. Black*, 64 F.2d 116 (CA 2); *Norstrom v. Wahl*, 41 F.2d 910, 914 (CA 7)).

The reason for the rule is, of course, clear: to compensate complainant for the loss caused by respondent's disobedience to the decree, or, otherwise put, to make reparation to the complainant injured by respondent's disobedience of the decree. When, as here, it is shown that appellee has violated the decree and appellant has suffered thereby,

“The court has no discretion to withhold the appropriate remedial order. In this respect the situation is unlike that of criminal contempt where the court in its discretion may withhold

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<sup>3</sup>See *Union Tool Co. v. Wilson*, 259 U.S. 107, 112: “. . . legal discretion in such a case does not extend to a refusal to apply well settled principles of law to a conceded state of facts.”

See also, *Enoch Morgan's Sons Co. v. Gibson*, 122 F. 420, 423 (CA 8): “Moreover, if that right was being invaded by the appellee, notwithstanding the decree, the court which entered the decree could with no greater propriety refuse relief, when the fact was called to its attention by the appellant, than it could withhold an execution to collect a judgment which it had rendered.”

punishment for the past act of disobedience. An order imposing a compensatory fine in a civil contempt proceeding is thus analogous to a tort judgment for damages caused by wrongful conduct.” (*Parker v. United States, supra*, at p. 70.)

Certainly in a tort case, if the Court found that the defendant had invaded plaintiff’s rights and that plaintiff had suffered damages thereby, there would be no “discretion” in the Court to refuse to assess damages.

For the months he spent in jail as a result of appellee’s illegal conduct, for the costs and reasonable attorneys fees required to procure his release and prosecute the contempt proceeding, Yanish is entitled to reparations against appellee. The failure of the Court below to award such reparations was clear error and requires a reversal of its judgment on that issue.

Dated, San Francisco, California,

May 11, 1955.

Respectfully submitted,

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*Attorneys for Appellant.*

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,

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*Of Counsel.*

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No. 14,518

IN THE

United States Court of Appeals  
For the Ninth Circuit

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NAT YANISH,

*Appellant,*

VS.

BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
Service,

*Appellee.*

APPELLEE'S BRIEF.

---

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No. 14,518

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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NAT YANISH,

*Appellant,*

VS.

BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
Service,

*Appellee.*

---

**APPELLEE'S BRIEF.**

---

The appeal herein is from the order of the District Court of July 12, 1954 which found that respondent was on *March 9, 1953*, in "technical contempt" of a previous order, dated July 20, 1950, enjoining the imposition of conditions in a delivery bond, when he *notified* petitioner that conditions would be imposed, although acting in good faith and by written direction of his superior officer, but decreed that no sanctions be imposed, nor reparations be awarded to petitioner. (R. 45.)

**JURISDICTION.**

Is the order of July 12, 1954 from which the appeal herein was noted, an appealable order? Said order involves a civil contempt proceeding.

*McCrone v. United States*, 307 U.S. 61, 64;

*Fox v. Capital Co.*, 299 U.S. 105.

Appellant cites 28 *U.S.C.* 1291, 1292 as conferring jurisdiction upon this Court.

Appellee challenges jurisdiction under either section on the ground that the order appealed is neither a final order under 1291, nor an interlocutory order under 1292.

*Roger St. Helen v. Wyman*, No. 14619 decided by this Court April 13, 1955;

*McDoyle v. London Guarantee Co.*, 204 U.S. 599;

*Taylor v. Bowles*, (CA-9) 152 F. 2d 3;

*In re Eskay*, (CA-3) 122 F. 2d 819.

**STATUTES.**

8 *U.S.C.* (1946 ed.) 156, Section 20 of the Immigration Act of 1917, as amended:

“\* \* \* Pending the final disposal of the case of any alien so taken into custody, he may be released under a bond in the penalty of not less than \$500 with security approved by the Attorney General, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he



shall be found to be unlawfully within the United States.”

Effective September 23, 1950, sec. 23 of the Internal Security Act of 1950 amended sec. 20 of the 1917 Act.

(1) The above portion of 8 *U.S.C.* 156 was amended as follows:

“Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than \$500 with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made.”

(2) The following paragraph was added as 8 *U.S.C.* 156(b):

“(b) Any alien, against whom an order of deportation, heretofore or hereafter issued, has been outstanding for more than six months shall, pending eventual deportation, be subject to supervision, under regulations prescribed by the Attorney General. Such regulations shall require any alien subject to supervision (1) to appear

from time to time at specified times or intervals before an officer of the Immigration and Naturalization Service for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information whether or not related to the foregoing as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than \$1,000 or shall be imprisoned not more than one year, or both."

8 *U.S.C.* 1252(a), Section 242(a) of the Immigration and Nationality Act of 1952:

"(a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than \$500 with security approved by the

Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. \* \* \*

8 *U.S.C.* 1252(c), Section 242(c) of the Immigration and Nationality Act of 1952:

“When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien’s departure from the United States, during which period, at the Attorney General’s discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. \* \* \*

8 *U.S.C.* 1252(d), Section 242(d) of the Immigration and Nationality Act of 1952:

“(d) Any alien, against whom a final order of deportation as defined in subsection (c) of this section heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include pro-

visions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than \$1,000 or shall be imprisoned not more than one year, or both.”

8 *U.S.C.* 1101, note, Section 405(a) of the Immigration and Nationality Act of 1952:

“Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal,

brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect.”

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### **QUESTION PRESENTED.**

The only question cited concerns the specification of error that the Court erred in refusing to impose sanctions and award reparations.

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### **STATEMENT OF THE CASE.**

The deportation proceedings against appellant were commenced in 1946 under the Act of February 5, 1917 (39 Stat. 874). Pending the final disposition of the charge appellant was released on bond. The determination of deportability of appellant was pending in 1950 when the order of July 28, 1950, enjoining appellee from “requiring (Yanish) to revise or amend the said bail bond by requiring periodic visits from him to the Immigration Service, or in any other particular except as to the principal amount of said bond”, was entered. On December 24, 1952 Public Law 414, 82nd Congress, the McCarran-Walter Act, 8 *U.S.C.* 1101 et seq., became effective.

On March 9, 1953 the determination of the deportability of appellant was still pending. The notice then given to appellant that conditions would be imposed in the bond was by written direction of appellee's superior and in accordance with Sec. 242(a) of the McCarran-Walter Act (8 *U.S.C.* 1252(a)), and section 23 of the Internal Security Act of 1950 (64 Stat. 98), which amended 8 *U.S.C.* 156 (Section 20 of the Immigration Act of 1917).

On March 11, 1953 the status of appellant changed in that on said day a final order of deportation was made against him. The Court below has found that appellant was "so notified" on March 16, 1953.

On March 17, 1953 appellant, being then subject to a final order of deportation of which he had notice, was taken into custody.

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## ARGUMENT.

### I.

Appellant apparently has not read the order of the Court below from which the appeal has been taken. On page 4 of his brief he says:

"This appeal is from the refusal to impose sanctions and award reparation. No appeal was taken from the finding that by imprisoning appellant he was in contempt of Judge Lemmon's order."

There has been no such finding. The only finding made was that a "technical contempt" occurred on March 9, 1954 when appellee notified petitioner that

conditions would be imposed. The *notice* to appellant was the only act committed by appellee prior to March 11, 1953 and while deportation proceedings were pending. Subsequent to March 11, 1953 the status of appellant had changed. He was then subject to a final order of deportation. The trial judge's use of the word "technical" clearly indicates that although he found that appellee had acted in good faith and by written direction of his superior, in view of this Court's holding that the applicability of Section 242 "must be considered in the light of the broad and comprehensive savings clause" (Sec. 405 of the McCarran-Walter Act (8 *U.S.C.* 1101, note)) he had concluded that a status under the 1917 Act and the order of July 28, 1950 had been saved to appellant pending final determination of deportability and that therefore there was a *technical* violation. The trial judge also expressly found that when appellant was taken into custody on March 17, 1953 his status had changed in that the order for deportation had become final.

Appellant's statement on page 1 of his brief—"and this, despite the fact that as a result of appellee's contempt, appellant was forced to spend two and one-half months illegally in jail \* \* \*" is not supported by the Court's finding.

Appellant's statement on page 5 of his brief—"The sole question thus presented is whether under such circumstances and in the face of an undisputed record that as a result of that contempt appellant was incarcerated for two and one-half months \* \* \*"—is not supported by the Court's finding.

We repeat that the only contempt found by the Court is in *sending* the notice on March 9 and this the Court characterized as "technical".

Appellant has not specified the *finding of the Court* as error.

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## II.

**THE MATTER OF THE RELEASE OF APPELLANT FROM CUSTODY PENDING DEPORTATION PROCEEDINGS BECAME MOOT ON MARCH 11, 1953 WHEN THE DEPORTATION ORDER BECAME FINAL.**

On March 16, 1953 appellant received notice that the deportation order had become final on March 11, 1953. On March 17, 1953 a petition for a writ of habeas corpus was filed below. The petition (p. 6 Tr. of Record, No. 13,785 this Court) alleges in paragraph V(c) "that 242(a) of the Immigration and Nationality Act, under color of which the Immigration and Naturalization Service purports to act, has no application to petitioner, in that petitioner has been released under a bond not referred to in said section, and further, that by section 405 of said Act the provisions of the Act are inapplicable to the status, rights and bond of petitioner." The petition was not entertained below. An appeal from the dismissal order was noted and on March 22, 1954 after appellant conceded the cause to be moot, this Court, in No. 13,785, entered a per curiam order dismissing the appeal as moot.

In *United States ex rel. Spinella v. Savoretti*, 201 F. 2d 364 (CA-5), cert. den. 345 U.S. 975, a petition



for writ of habeas corpus for release under bond pending deportation proceedings was denied and petitioner appealed. Before the hearing date of the appeal, appellee filed a motion to dismiss the appeal as moot on the ground that the deportation order had become final. The Fifth Circuit held per curiam "that the deportation order is now final; that the question raised by his appeal, whether the Court erred in denying their bond pending the deportation proceedings, has become moot", and dismissed the appeal.

This Court, in *Carlisle v. Landon*, 219 F. 2d 439 (CA-9), upon a similar situation likewise dismissed the appeal as moot and cited *Spinella v. Savoretti*, supra. The appeal was from a denial in a habeas corpus proceeding of liberty pending final determination of deportation proceedings before immigration authorities. The deportation proceedings were completed and petitioner-appellant was finally ordered deported. On April 15, 1955 the opinion appearing at 219 F. 2d 439, was amended by striking the last two paragraphs and inserting in lieu thereof the following:

"We therefore hold that this appeal is moot. United States ex rel. Spinella v. Savoretti, 5 Cir., 201 F. 2d 364; certiorari denied 345 U.S. 975, 73 S. Ct. 1124, 97 L. Ed. 1930.

"Appeal dismissed."

## III.

Appellant contends that he is entitled as of right to an order in civil contempt imposing a compensation fine and relies upon *Parker v. United States* (CA-1), 153 F. 2d 66.

(a) **The action of the trial Court is discretionary.**

From *Union Tool Co. v. Wilson*, 259 U.S. 107, the following is quoted from page 112:

“In the determination of the question whether an injunction has been violated and if so whether compensation shall be made to the injured party, there may be occasion for the exercise of judicial discretion; but the order to be entered in such a proceeding is not exclusively or necessarily a discretionary one. See *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 135 Fed. 774; *Gordon v. Turco-Halvah Co.*, 247 Fed. 487.”

Cf.:

*United States v. United Mine Workers*, 330 U.S. 258;

*Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418.

In *Miller v. Zaharias* (CA-7), 168 F. 2d 1, 3, cert. den. 335 U.S. 823, the Seventh Circuit held:

“As we have frequently held, the action of the trial court upon a charge of contempt is discretionary in character and is not to be reversed

except for abuse of such discretion or unless clearly erroneous.”

*NLRB v. Deena Artware* (CA-6), 207 F. 2d 798;

*Jewel Tea Co. v. Kraus* (CA-7), 204 F. 2d 549.

**(b) Appellee acted solely and only as an officer of the United States.**

The trial Court has used the term “technical contempt” to characterize the notice of March 9 given by appellee to appellant. The appellee herein is the District Director of the Immigration and Naturalization Service in San Francisco. At all times he acted in his official capacity as an officer, agent, and employee of the United States. His performance of duty is controlled by the statutes and laws enacted by the Congress of the United States, the regulations of the department under which he served and the orders and directions of his superior.

There is a long list of authorities for the principle that a government official is immune from liability for acts authorized by law and within the scope of his duties. Mistake of fact, mistake of law, or even ulterior motive, will not make the official liable for damages for his action.

*Spalding v. Vilas*, 161 U.S. 483, 498;

*Long v. Wood*, 92 F. 2d 211, cert. den. 302 U.S. 686;

*United States v. Craig*, 266 Fed. 230;

*Cooper v. O'Connor*, 99 F. 2d 135;

*Cooper v. O'Connor*, 107 F. 2d 207;  
*Gladstone v. Galton* (CA-9), 145 F. 2d 742;  
*Laughlin v. Rosenman*, 163 F. 2d 838;  
*Taylor v. McGrath*, 194 F. 2d 883;  
*Orvis v. Brickman*, 196 F. 2d 752;  
*Taylor v. Glotfelty*, 201 F. 2d 51;  
*Keppleman v. Upton* (N.D. Cal.), 84 F. Supp.  
 478;  
*United States v. Merchants Transf. & Storage*  
 (CA-9), 144 F. 2d 324.

(c) Appellee acted in good faith within the scope of his authority by direction of his superior, and in accordance with an Act of Congress.

Appellee had been directed by his superiors to act in accordance with the provisions of the McCarran-Walter Act, the Immigration and Nationality Act of 1952. (8 U.S.C. 1252(a).) Said Act authorized the imposing of conditions in a delivery bond. The notice of March 9, 1953 was given in good faith in accordance with said Act and direction.

In the case of *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. 421, the defendants had been enjoined from building a certain bridge which would obstruct navigation on a certain river. Thereafter Congress enacted legislation which did authorize the bridge. The defendants, in reliance upon this Act of Congress as authority, proceeded with the construction of the bridge in disobedience of the injunction. Upon a motion for attachments against the persons mentioned for this disobedience and con-

tempt, the majority of the Court (p. 436) was of the opinion "that the Act of Congress afforded full authority to the defendants to reconstruct the bridge and the decree directing its alteration or abatement could not, therefore, be carried into execution after the enactment of this law, and inasmuch as the granting of an attachment for the disobedience is a question resting in the discretion of the Court, under all the circumstances of the case, the motion should be denied."

The dissenting opinion of Justice McLean, although expressing the view that the law was unconstitutional and void, still considered it an excuse for the defendants' contempt.

The following is quoted from page 449:

"Six of my brethren now hold that the Act of Congress arrested the progress of the Court in carrying their decree into effect and gave the defendants a right to build their bridge. The injunction prohibited them from reconstructing it; can the defendants be punished for contempt for doing that which the law authorized? This view shows that the injunction ought not to have been granted, as it was against the law. And is not this a sufficient excuse for the contempt charged? *My view is, that the law was unconstitutional and void, and yet I consider it as excusing the defendants' contempt. I cannot punish defendants by fine or imprisonment for doing that which the law authorized them to do.*" (Emphasis ours.)

*Mills v. Green*, 159 U.S. 651, 16 S.Ct. 132.

From the *United States v. United Mine Workers*, 330 U.S. 358, the following is quoted from pages 303-4:

“Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two parties: to coerce the defendant into compliance with the court’s order, and to compensate the complainant for losses sustained. *Gompers v. Bucks Stove and Range Co.*, supra, at 448, 449. Where compensation is intended, a fine is imposed payable to the complainant. Such fine must of course be based upon evidence of complainant’s actual loss, and his right, as a civil litigant, to the compensation fine is dependent upon the outcome of the basic controversy.”

In the case of *Newton Rubber Works v. De Las Casas*, et al., 84 Northeast Reporter 119, the Supreme Judicial Court of Massachusetts had before it a situation in which the defendant had been enjoined from maintaining a certain dam or obstructing a certain river to the injury of the plaintiff. A legislative enactment thereafter authorized such a dam and the defendant then constructed it. On the proceeding to hold defendant in contempt, the Court said:

“This statute, enacted after the decree, gave the respondents ample authority to do all that they are alleged to have done.”

The Court was of the opinion that the defendant could not be held in contempt, saying that if the effect of the statute was in doubt he could bring a bill of review to have the decree vacated, but continued

“But this was unnecessary. For, if they acted in good faith, understanding that the effect of the new law was to give them authority which would relieve them from the restraint of the decree, and if in fact the statute gave them such authority, there would be no ground for holding them guilty of wilful disobedience in contempt of the court.”

On March 16, 1953 Judge Murphy refused to issue the order to show cause on the ground that the new law, Public Law 414, the Immigration and Nationality Act of 1952, the McCarran-Walter Act (8 *U.S.C.* 1101, et seq.) was then applicable and provided authority for the action of appellee. This Court, in *Yanish v. Barber*, 211 F. 2d 467, reversed Judge Murphy's order of dismissal and remanded the cause with direction to issue the order to show cause requiring appellee to show cause why he should not be held in contempt (of Judge Lemmon's order of July 28, 1950). The order (Tr. 4) of Judge Hamlin of July 12, 1954 is the result of the hearing on the order to show cause in compliance with the mandate. This order makes no mention of any status saved to appellant by the savings clause of the 1952 Act, Sec. 405(a). The judge simply found there was a “technical contempt” of the injunction when the notice was sent on March 9, 1953, but that when appellant was taken into custody on March 17, 1953 his status had changed in that on March 11, 1953 he had become subject to a final order of deportation.

## IV.

**APPELLANT HAS SUFFERED NO DAMAGE.**

On the contrary, he has successfully avoided deportation from March 11, 1953 to date. No proceeding has been commenced to review the legality of the deportation order. Appellant's status has changed from 8 *U.S.C.* 1252(c) to 8 *U.S.C.* 1252(d) in that more than six months has elapsed since the deportation order became final.

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**CONCLUSION.**

It is respectfully submitted that the Court below did not err in ordering no sanction imposed on appellee nor reparation awarded to appellant.

Dated, San Francisco, California,

June 17, 1955.

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

*Attorneys for Appellee.*



No. 14,518

United States Court of Appeals  
For the Ninth Circuit

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NAT YANISH,

*Appellant,*

VS.

BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
Service,

*Appellee.*

APPELLANT'S CLOSING BRIEF.

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# United States Court of Appeals For the Ninth Circuit

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NAT YANISH,

*Appellant,*

vs.

BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
Service,

*Appellee.*

## APPELLANT'S CLOSING BRIEF.

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### INTRODUCTION.

In his Opening Brief Appellant posed the question before this Court in the following manner:

“When a respondent is found in contempt of a court order and when the record shows that petitioner has suffered damages as a result of that contempt, may a trial court refuse to impose sanctions on respondent or award reparation to petitioner?” (*Opening Brief*, pp. 4-5.)

Appellee, as he must, accepted the question thus posed. (Appellee's Brief, p. 7.) But to this question, Appellee says little or nothing to meet or rebut the impact of Appellant's solid legal and factual position.

Rather Appellee appears deliberately to miss the point, and thus to display the utter poverty of his position. He almost ignores the basic fact that he is in contempt of court and that his contempt has caused substantial damage and injury to Appellant including imprisonment for a period of over two months. He beclouds the issue with a re-argument of the basic law of this case which was decided adversely to him by this Court in *Yanish v. Barber*, 211 Fed. (2d) 467. Finally, he raises, without discussion or analysis, a captious query to the jurisdiction of this appeal.

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### JURISDICTION.

Appellee states that the Order from which this appeal is taken is a non-appealable order. However the cases cited by Appellee do not sustain that position. It is true that the contempt of which Appellee was guilty was a civil contempt. However it does not follow therefrom or from the cases cited by Appellee that a civil contempt order is nonappealable. In the cases cited the contempt proceeding had been commenced prior to judgment in the main action. Here the judgment in the main action is a final one from which no appeal has been taken. The contempt was committed a long time after this judgment had become final. Thus the Order of the District Court in this case refusing to impose sanctions upon Appellee and to award reparation to Appellant *finally* denied the relief sought by Appellant in this contempt proceeding. The Order therefore was a final one and

appealable as a final order. (*Lamb v. Cramer*, 285 U.S. 217, 220, 221.)

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**APPELLANT'S IMPRISONMENT WAS OCCASIONED SOLELY  
BY HIS REFUSAL TO YIELD TO ILLEGAL AND CONTEMP-  
TUOUS DEMANDS OF APPELLEE.**

Appellee calls the attention of this Court, in some detail, to the fact that during the critical period of March 1953, the deportation order against Appellant became final a few days before he was incarcerated by Appellee. The inference intended is that the cause for imprisonment is to be found in that fact and not in the fact of Appellee's contempt. The intended inference is at variance with the prior opinion of this Court:

“Petitioner (Yanish) was in fact taken into custody on March 17, 1953 for failure to furnish the bond demanded \* \* \*”

(211 Fed. (2d) at footnote 3, p. 409.)

It is also at variance with Appellee's sworn testimony in the proceeding from which this appeal is taken. Appellee testified that he received a general directive shortly after January 14, 1953, almost 60 days *before* the deportation order became final, in accordance with which directive he demanded that Appellant post a new bond containing the objectionable conditions and imprisoned Appellant for his refusal to accede to this demand. (Record, pp. 52-55.) His only testimony concerning the finality of the deportation order is a statement, in response to a lead-

ing question, that he knew the deportation order had become final. (Record, p. 55.) Under cross-examination he testified definitely that the instructions under which he acted to require the new bond conditions and to take Appellant into custody, were the instructions received shortly after January 14, 1953. (Record, p. 61.)

The fact is that Appellant was imprisoned for one reason and one reason only: His refusal to yield to Appellee's demand of March 9, 1952, that he agree to conditions of bond forbidden by Judge Lemmon's "valid and subsisting" injunction.

Characterization of Appellee's conduct as "technical contempt<sup>1</sup> cannot detract from its contemptuous nature. Nor can it relieve him of responsibility for the events that flowed directly from it and were part of it. Nor can it relieve him of responsibility for the damages thereby incurred by Appellant.

With these basic facts in mind, the balance of Appellee's argument lacks all persuasion and is shown to ignore the real issue in this case. Thus it is patent that Appellee's acts were not authorized by law or within the scope of his authority.<sup>2</sup> His acts were not authorized by the Immigration and Nationality Act of 1952 (P.L. 414, 8 USC §§1101, et seq.), as Appellee contends, because this Court has already held that they were not. Nor were his acts permitted by Judge Lemmon's injunction, because the District Court has

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<sup>1</sup>Appellee's Brief, pp. 8-10.

<sup>2</sup>Appellee's Brief, pp. 13-17.



already finally held that they were not. Appellee does not and cannot point to any other law or decision which authorized his acts. Being unlawful, *a fortiori*, they could not have been within the scope of his authority.

It follows, therefore, that the refusal of the District Court to impose sanctions and award reparation constitutes "a refusal to apply well settled principles of law" to which refusal legal discretion does not extend.

*Union Tool Co. v. Wilson*, 259 U.S. 107, 112;

*Parker v. U. S.*, 153 Fed. (2d) 66, 70, C.A. 1;

*Ingraham Co. v. Germanow*, 4 Fed. (2d) 1002, C.A. 2;

*Enoch Morgan's Sons Co. v. Gibson*, 122 Fed. 420, 423;

*In re Sylvester*, 41 Fed. (2d) 231, D.C.N.Y.

There is no law to the contrary. Cases cited by Appellee<sup>3</sup> do not either in holding or as quoted by Appellee support his position. They are either *not* in point or as in the case of *Union Tool Co. v. Wilson*, *supra*, actually support Appellant's position.

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### CONCLUSION.

Appellee has been found in contempt of Court. His contempt caused Appellant among other things, to be deprived of his liberty for a period of more than two months. For this and his other damage he is entitled to reparation in the form of a compensatory fine.

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<sup>3</sup>Appellee's Brief, pp. 12-13.

The failure of the Court below to award such reparation was clear error and requires a reversal of its judgment on that issue.

Dated, San Francisco, California,  
July 15, 1955.

Respectfully submitted,  
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